Supreme Court, U.S.

(1)

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In the Supreme Court of the United States

OCTOBER TERM, 1993

ALLSTATE INSURANCE COMPANY
PETITIONERS

VERSUS

LOUISIANA INSURANCE
GUARANTY ASSOCIATION,
RESPONDENT

AND

MATTHEW REY,
RESPONDENT

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PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether retroactive application of Act 237 of the 1992 Louisiana Legislature amending Louisiana Revised Statute Annotated 22:1386 violates the United States Constitution Article 1 Section 10.

2) Whether retroactive application of Act 237 of the 1992 Louisiana Legislature amending Louisiana Revised Statute Annotated 22:1386 violates the 14th Amendment Due Process Clause of the United States Constitution.

LIST OF PARTIES

A) Allstate Insurancae Company, petitioner, is a wholly owned subsidiary of The Allstate Corporation

B) Louisiana Insurance Guaranty Association, a non-profit unincorporated legal entity, Respondent

C) Matthew Rey, Respondent

Respondent, Matthew Rey seeks to recover damages from petitioner, Allstate Insurance Company and respondent, Louisiana Insurance Guaranty Association as a result of an automobile accident which occurred on or about July 30, 1990. Petitioner submits that retroactive application of Act 237 of the 1992 Louisiana Legislature is unconstitutional and that the Louisiana Insurance Guaranty Associations' responsibility to the respondent, Matthew Rey is the primary insurance/indemnity obligation.

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JURISDICTION

The Judgment of the Louisiana Supreme Court was entered on January 14, 1994. This Petition for Writ of Certiorari is sought within 90 days of the judgment and thus timely pursuant to 28 U.S.C. §1257 and 2101 (c) and Rules 10(1)(c) and 13(4) of the Rules of Court for the U.S. Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

ARTICLE III, SECTION 2., CLAUSE 1 of the United States Constitution provides:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ..."

ARTICLE I, SECTION 10., CLAUSE 1. of the United States Constitution provides:

> "No State shall ... pass any ... law impairing the obligation of contracts."

AMENDMENT XIV, SECTION 1. of the United States Constitution provides:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The constitutionality of Act 237 of the 1992 Regular Session of the Louisiana Legislature amending La. Rev. Stat. Ann. 22:1386 is questioned. 28 U.S.C. § 2403(b) may be applicable. The State of Louisiana is not a party to this litigation.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ALLSTATE INSURANCE COMPANY
PETITIONERS

VERSUS

LOUISIANA INSURANCE
GUARANTY ASSOCIATION,
RESPONDENT

AND

MATTHEW REY,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

Petitioner, Allstate Insurance Company, respectfully prays that a Writ of Certiorari be granted to review the decision of the Louisiana Supreme Court entered in the above-entitled proceeding on January 14, 1994.

STATEMENT OF THE CASE

The facts as found by the trial and appellate courts are set forth in their decisions which are included in the appendix. The facts are undisputed and may be briefly summarized as follows.

On August 1, 1989, Matthew Rey was injured when his car was struck by an automobile being driven by Wendy Guidry. Matthew Rey filed suit on July 30, 1990 against Wendy Guidry, Dixie Lloyds Insurance Company as Guidry's liability insurer, and Allstate Insurance Company, as Matthew Rey's uninsured motorist carrier.

The Louisiana Insurance Guaranty Association, hereinafter referred to as LIGA, was named by amending petition as Dixie Lloyds Insurance Company's successor after Dixie Lloyds Insurance Company was liquidated on December 20, 1990.

At the time of this accident, August 1, 1989, Louisiana law was well settled regarding the interpretation of Louisiana Revised Statute Annotated 22:1386. Upon the insolvency of the tortfeasor's carrier, LIGA is substituted and treated as if it was the primary insurance carrier. *Billeaudeau v. Lemoine,* 386 So.2d 1359 (La. 1980). The tortfeasor is not uninsured. The "non-duplication provision" of La. Rev. Stat. Ann. 22:1386, requiring the injured party to exhaust all other insurance before recovering against LIGA, did not apply to uninsured motorist coverage. *Hickerson v. Protective Casualty Co.,* 383 So.2d 377 (La. 1980).

After the accident, La. Rev. Stat. Ann. 22:1386 was amended by Act 130 of the 1990 Louisiana Legislature effective September 7, 1990. Act 130 of 1990 required the plaintiff to exhaust uninsured motorist coverages before recovering against LIGA. 1990 La. Acts 130.

Partial motions for summary judgment were filed by

by the LIGA and Allstate seeking ranking of coverage.

A judgment (reproduced in the Appendix) was rendered on May 20, 1992 by the Trial Court, Division "D" of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana denying the partial summary judgment filed by LIGA and granting the partial summary judgment filed by Allstate Insurance Company finding LIGA's coverage to be primary.

Thereafter, La. Rev. Stat. Ann. 22:1386 was amended by Act 237 of the 1992 Louisiana Legislature effective June 10, 1992. Act 237 of 1992 added Section 3 which provided that the amendment applied to all covered claims pending on the effective date of the Act, June 10, 1992. 1992 La. Acts 237.

The matter was called to Trial on September 28, 1992 and judgment was rendered in favor of the plaintiff, Matthew Rey in the amount of $2,300.00 and against LIGA pursuant to the partial motion for summary judgment which had been rendered on May 20, 1992.

An appeal was taken by LIGA to the Fifth Circuit Court of Appeal, State of Louisiana. LIGA argued the applicability of Act 130 of 1990 and Act 237 of 1992. Allstate Insurance Company, as appellee argued that retroactive application of either act was unconstitutional and violated Article I, Section 10 of the United States Constitution and Amendment XIV, Section 1 of the United States Constitution.

The Louisiana Fifth Circuit Court of Appeal reversed

the Trial Court. Allstate Insurance Company applied for writs of certiorari to review the decision of the Fifth Circuit Court of Appeal. Writ of certiorari was granted by the Supreme Court of the State of Louisiana and consolidated with 93-C-1271, *Andrea E. Segura v. Melissa A. Frank, et al.* on writ of certiorari to the Court of Appeal, Third Circuit.

At issue before the Supreme Court of Louisiana was Act 130 of the 1990 Louisiana Legislature and Act 237 of the 1992 Louisiana Legislature.

The Supreme Court noted that at the time partial summary judgment was granted, Act 237 of the 1992 Louisiana Legislature had not been enacted. Therefore, the constitutional questions surrounding retroactive application of Act 237 of the 1992 Louisiana Legislature were argued for the first time to the Fifth Circuit Court of Appeal.

The Louisiana Supreme Court concluded that Act 130 of 1990 was substantive and not retroactive. Allstate Insurance Company argued that retroactive application of Act 237 of the 1992 Louisiana Legislature violates Article I, Section 10 of the United States Constitution and Amendment XIV, Section 1 of the United States Constitution. The Louisiana Supreme Court determined that Act 237 of the 1992 legislature substantially impaired Allstate's contractual obligations under the uninsured motorist policies, but that the State has traditionally regulated uninsured motorist insurance which significantly lessens the severity of the impairments.

The Louisiana Supreme Court held that retroactive

application of the Act 237 of 1992 is constitutional and constitutes a legitimate exercise of the State's police power for the purposes of protecting the State's citizens from economic harm.

Petitioner now seeks review of the Louisiana Supreme Court's decision in this Court by writ of certiorari.

REASONS FOR GRANTING WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

I. Introduction

Petitioner submits the following in support of their petition for writ of certiorari to review the Louisiana Supreme Court's decision of January 14, 1994. That decision affirmed the decision of the Fifth Circuit Court of Appeal which had previously reversed the Trial Court's decision. Because the Louisiana Supreme Court's decision is contrary to the United States Constitution and existing controlling precedent and for other reasons stated herein, the petition for writ of certiorari should be granted.

II. Legislature and Judicial history of La. Rev. Stat. Ann. 22:1386.

The Louisiana Legislature created LIGA as a private non-profit unincorporated legal entity governed by a Board of Directors and composed of "member insurers". La. Rev. Stat. Ann. 22:1380(a). "Member insurers" are defined as companies licensed and authorized to transact insurance in the State of Louisiana. As a condition for authority to

transact business in this State, insurers fund LIGA, which said funding is based upon a percentage of premiums. La. Rev. Stat. Ann. 22:1382 (West 1978).

At the time of the accident, August 1, 1989, La. Rev. Stat. Ann. 22:1382 defined LIGA's duties as follows:

> A. The Association shall:
> (1)(a) Be obliged to the extent of the covered claims existing prior to the determination of the insurer's insolvency, or arising after such determination...
>
> (2) Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent...

Further, at the time of the accident, the "Nonduplication of recovery" provision of the La. Rev. Stat. Ann. 22:1386 provided in pertinent part:

> **§ 1386. Nonduplication of recovery**
>
> 1. Any person having a claim against an insurer under any provision in an insurance policy, other than a policy of an insolvent insurer which is also a covered claim, shall be required first to exhaust his rights under such policy. Any amount payable on a covered claim under this policy shall be reduced by the amount of recovery funded such insurance policy.

The Supreme Court of Louisiana in the cases of *Billeaudeau v. Lemoine,* 386 So.2d 1359 (La. 1980) and *Hickerson v. Protective Casualty Co.,* 383 So.2d 377 (La. 1980) clearly enunciated the provisions of the so-called "LIGA laws". The Louisiana Supreme Court in *Billeaudeau* stated:

> LIGA is to be treated as though it was the insurer that issued Lemoine's (tortfeasor) policy. *Billeaudeau* at 1361.

The Court in *Hickerson* determined the nonduplication provision of La. Rev. Stat. Ann. 22:1386, which requires an injured party to first exhaust all other insurance before recovering from LIGA, was not intended to apply to uninsured motorist coverage.

Hickerson and *Billeaudeau* remained the law of Louisiana for ten years. After the accident in question, the Legislature passed 1990 La. Act 130 which amended La. Rev. Stat. Ann. 22:1386 to read as follows:

> **§ 1386. Nonduplication of recovery**
>
> 1. Any person having a claim against an insurer under any provision in an insurance policy, other than a policy of an insolvent insurer which is also a covered claim, shall be required first to exhaust his rights under such policy. Such other policies of insurance shall include but shall not be limited to liability coverage, uninsured or underinsured motorist liability coverage, or both, hospitalization, and other medical expense coverage. Any

> amount payable by such other insurance shall act as a dollar-for-dollar credit against any liability of the association under this Part.

The 1990 amendment to La. Rev. Stat. Ann. 22:1386 required an injured claimant to first to exhaust uninsured motorist recovery before recovering against LIGA. This 1990 amendment legislatively overrules the Louisiana Supreme Court case law in existence for ten years. Two years later, the Louisiana Legislature again amended La. Rev. Stat. Ann. 22:1386, the "Nonduplication of recovery" provision by Act 237 of 1992. Act 237 of 1992 states in pertinent part:

> **LOUISIANA INSURANCE GUARANTY ASSOCIATION—REMOVAL OF DOLLAR-FOR-DOLLAR OFFSET AGAINST CLAIMANTS OF INSOLVENT INSURERS: DUTY TO DEFEND INSURED OF AN INSOLVENT INSURER**
>
> **ACT NO. 237**
>
> H.B. No. 1485
>
> **AN ACT to amend and reenact R.S. 22:1386(A) and (C) and R.S. 22:1386(A)(2) and to enact R.S. 22:1386(D), relative to the Louisiana Insurance Guaranty Association; to remove the dollar-for-dollar offset used by said association against claimants of insolvent insurers; to provide for the duty to defend the insured of an insolvent in-**

insurance company: and to provide for related matters.

...

Be it enacted by the Legislature of Louisiana:

* * *

Section 2. R.S. 22:1386(A) and (C) are hereby amended and reenacted and R.S. 22:1386(D) is hereby enacted to read as follows:

§ 1386. Nonduplication of recovery

A. Any person having a claim against an insurer under any provision in an insurance policy, other than a policy of an insolvent insurer which is also a covered claim, shall be required first to exhaust his rights under such policy. Such other policies of insurance shall include but shall not be limited to liability coverage, uninsured or underinsured motorist liability coverage, or both, hospitalization, and other medical expense coverage. As to the association, any amount payable by such other insurance shall act as a credit against the damages of the claimant, and the association shall not be liable for such portion of the damages of the claimant.

* * *

...

> Section 3. This Act shall apply to all covered claims, as defined in R.S. 22:1379, pending on or arising on or after the effective date of this Act.

At issue is the effect of §1386(3) which states that the Act shall apply to all covered claims.

III. Retroactive Application of Act 237 of the 1992 Louisiana Legislature substantially impairs Allstate's contractual rights and obligations.

United States Constitution Article I, Section 10, the contract clause of the constitution, prohibits States from enacting laws that impair the "obligations of contracts." U.S. Constitution Article I, Section 10. "Although the language of the contract clause is facially absolute, its prohibition must be accommodated to the inherent police powers of this State to safeguard the vital interest of its people." *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 434 (1934); *Energy Reserve Group v. Kansas Power & Light,* 459 U.S. 400, 410. (1982).

The first question asked is whether the change in State Law has "operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244 (1978). Whether the change in State law has operated as a substantial impairment of a contractual relationship requires that there be a contract; that the change in the law impair that contract; and that

the impairment be substantial. *General Motors Corp. v. Romein,* 112 S.Ct. 1105, 1109 (1992).

Clearly a contractual relationship existed between Allstate Insurance Company and its insured, Matthew Rey. Allstate Insurance Company's obligations to Matthew Rey under the uninsured motorist portion of the policy required Allstate to pay damages for injuries to Matthew Rey caused by uninsured motorists. At the time of contract and at the time of accident, an individual whose insurer became insolvent was not uninsured. Act 237 of 1992 applied retroactively completely changes Allstate's contractual obligations requiring the uninsured motorist carrier's obligations to be primary when the law in existence at the time of accident and contract required uninsured motorist carriers obligations to be excess that of LIGA. There can be no greater substantive change to obligation than a new law which calls for payment when the law in existence at the time of accident and contract called for none.

A contractual relationship also existed between LIGA and Allstate Insurance Company. As a condition to transacting business within the State, Allstate Insurance Company was required to fund LIGA. Funding was based upon a percentage of premiums. Upon the insolvency of a tortfeasor's insurance company, LIGA was to step in the shoes of that insolvent insurance company. The tortfeasor, even if his liability carrier becomes insolvent, would not be uninsured. The tortfeasor would be insured as though LIGA had issued the policy.

Retroactive application of Act 237 destroys LIGA's

obligations to uninsured motorist carriers. These obligations and responsibilities are transferred to the uninsured motorist carrier an obligation for which the uninsured motorist carrier has received no premium. Further, LIGA has been funded by member insurers to accept these responsibilities and obligations.

"The severity of impairment measures the height of the hurdle the State legislation must clear." *Allied Structural Steel Co. v. Spannaus,* at 244. There can be no greater impairment than one that completely transfers obligations from LIGA to the uninsured motorist carrier without consideration.

The Louisiana Supreme Court concluded that the impairment of Allstate's contractual obligations would be substantial. However, the Court held that Allstate issued uninsured motorist policies "against a background of pervasive state regulations of UM insurance." *Rey v. Guidry,* 630 So.2d 714, at 730 (La. 1994).

In distinguishing *Rey* from the United States Supreme Court decision of *Allied Structural Steel Co.,* the Louisiana Supreme Court stated:

> Confronted with the State's broad power to regulate UM insurance and its pervasive exercise of that power, American and Allstate had reason to anticipate their obligations under the UM policies issued to Segura and Rey might be altered by further legislation. *Rey* at 731.

Act 237 of 1992 does not just alter the obligation of the various parties, but rather completely eliminates

LIGA's obligation by transferring same to the uninsured motorist carrier.

Further, 1992 La. Acts 237 is not an amendment to regulate uninsured motorist statutes, but rather amendments to the "LIGA" laws." Act 237, if applied retroactively, changes contractual rights and obligations of LIGA which had been well-settled for over ten years.

The impairment of Allstate's contractual rights and obligtions is substantial. Further, the impairment is not one of regulation, but a complete transfer of obligations of LIGA to the uninsured motorist carrier.

IV. A significant and legitimate public purpose does not exist for retroactive application of Act 237 of 1992.

> If the State regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation... *Energy Reserve Group v. Kansas Power & Light,* 459 U.S. 400 at 411 (1992).
>
> In applying this standard, however, complete deference to a legislature assessment of reasonableness and necessity is not appropriate because the State's self interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If the State could reduce its financial obligations whenever it wanted to spend for the money for what it regarded as an important public purpose, the contract clause would provide

no protection at all. *United States Trust v. New Jersey,* 431 U.S. 1, 25, 26 (1977).

The Supreme Court of Louisiana hypothesized that the legitimate and significant public purpose justifying retroactive application of Act 237 is to "minimize the unnecessary depletion of LIGA's funds while at the same time furthering the LIGA's laws stated purpose of avoiding financial loss to claimant of policy holders because of the insolvency of an insurer. La. Rev. Stat. Ann. 22:1378." *Rey,* at 732.

LIGA funds are depleted in guaranteeing insolvent insurers. It is a non-profit entity funded by insurance companies transacting business within the state. Depletion of LIGA funds as a result of insolvency is not unnecessary but is rather LIGA's bargained for obligation.

In *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398 (1934) a mortgage moratorium law enacted to provide relief for homeowners threatened with foreclosure was upheld. Five factors in upholding the law against a contract clause were discussed. "First, the State legislature had declared in the act itself that an emergency need for the protection of homeowners existed. *ibid.* at 444. Second, the State law was enacted to protect a basic societal interest, not a favored group. *ibid.* at 445. Third, the relief was appropriately tailored to the emergencies that it was designed to meet. *ibid.* Fourth, the imposed conditions were reasonable. *ibid.* at 445-447. And finally, the legislation was limited to the duration of the emergency. *ibid.* at 447." *Allied Structural Steel Co. v. Spannaus,* 438 U.S. at 242.

Retroactive application of Act 237 of the 1992 Legislature does not meet the test and conditions stated in *Home Bldg. & Loan Ass'n v. Blaisdell.* An emergency has not been identified. A favored group, LIGA, is protected at the expense of the uninsured motorist carriers. If an emergency did exist, the relief is not appropriately tailored to that emergency. Since LIGA is funded by "member insurers" from amounts based upon percentages of net premiums, additional LIGA funds can be obtained through raising member insurer contributions to LIGA. The imposed conditions are not reasonable in that they completely transfer LIGA's obligatins to uninsured motorist carriers without consideration. Prospective only application of Act 237 would achieve the same results without impairing past obligations and responsibilities.

> A state is not completely free to consider impairing the obligations of its own contract on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purpose equally well. *United States Trust Co. v. New Jersey,* 431 U.S. at 31.

Retroactive legislation which transfers well known and accepted obligations of LIGA to uninsured motorist carriers without consideration is drastic and harsh. A more moderate course, if needed, would be the increase of fees by member insurers funding LIGA.

The unnecessary depletion of LIGA funds, as hypothesized by the Louisiana Supreme Court, if true, is not a legitimate State purpose. "A state cannot refuse to

meet its legitimate financial obligation simply because they would prefer to spend the money to promote the public good rather than the private welfare of its creditors." *United States Trust Co. v. New Jersey,* 431 U.S. at 29.

Unlike the legislation in *Blaisdell,* which stated that an emergency existed, Act 237 of the 1992 Louisiana Legislature provides no such indication. The Act does, however, shed significant insight as to its purpose.

Act 130 which first amended La. Rev. Stat. Ann. 22:1386 in 1990 added a provision which stated "any amounts payable by such other insurance shall act as a dollar-for-dollar credit against any liability of the association under this part." 1990 La. Acts 130.
This provision gave LIGA a dollar-for-dollar credit against any other collectible insurance. Therefore, if other insurance was available which exceeded the limits of the insolvent carrier, LIGA's responsibility would be eliminated even if the injured party damages exceeded the collectible insurance. The 1992 La. Acts 237 was clearly a response to this controversial provision. So much so, the title of Act 237 of 1992 states:

> **LOUISIANA INSURANCE GUARANTY ASSOCIATION—REMOVAL OF DOLLAR-FOR-DOLLAR OFFSET AGAINST CLAIMANTS OF INSOLVENT INSURERS: DUTY TO DEFEND INSURED OF AN INSOLVENT INSURER**

The preamble states the purpose of the legislation was to remove the dollar-for-dollar offset urged by LIGA against claimants of insolvent insurers. The Act itself eliminates the dollar-for-dollar offset. 1992 La. Acts 237.

The Act is clearly intended by the legislature to make the removal of the dollar-for-dollar offset retroactive. At no place does the Act make reference to an emergency requiring retroactive application of the clause requiring injured parties to first exhaust all rights under uninsured motorist coverage. The nonduplication clause is restated only to remove the dollar-for-dollar offset and replace same with a credit in favor of LIGA against the damages of the claimant. Unlike the dollar-for-dollar offset it replaces, the credit against the damages of the claimant does not diminish an injured party's recovery if damages exceed collectable insurance.

A significant and legitimate public purpose behind Act 237 of 1992 does not exist. A State legislature is not free to impose substantial drastic contractual impairment when a more moderate course of action exists. Since LIGA is funded by member insurers, if additional funds are needed, the funding by member insurers can be increased. Retroactive substantial impairment of contract need not occur.

Further, Act 237 when read with Act 130 clearly indicates the purpose of the legislature was not retroactive application of the provision that claimants first exhaust all rights under uninsured motorist coverage, but was rather legislation designed to retroactively eliminate the harsh and controversial dollar-for-dollar credit first contained in Act 130 of 1990.

V. Act 237 of 1992 is not based upon reasonable conditions and is not a character appropriate to the public purpose justifying a legislative adoption.

When uninsured motorist carriers make payment, the uninsured motorist carrier obtains by subrogation the rights of the injured party against the tortfeasor to the extent of payment made. In determining in 1980 that La. Rev. Stat. Ann. 22:1386 did not apply to uninsured motorist coverage, the Louisiana Supreme Court in *Hickerson* expressed concern that an adverse holding would result in a tortfeasor being left unprotected from subrogation claims asserted by the claimant's uninsured motorist carrier. The Court noted that such a result would frustrate LIGA's stated purpose of avoiding "financial loss to claimants or policy holders becaues of the insolvency of an insurer." *Hickerson,* 383 So.2d at 379.

When the Louisiana Legislature amended 22:1386 by Act 130 of 1990 to require claimants to first exhaust all monies under uninsured motorist coverage, the Legislature also addressed the concerns of the Court in *Hickerson* by enacting Act 105 of 1990. In 1990 La. Acts 105, the Legislature amended the definition of the term "Covered Claim" in La. Rev. Stat. Ann. 22:1379(3) in pertinent part by adding the following emphasized language:

> (b) "Covered Claim" shall not include any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise. **In addition, the insured of an insolvent insurer shall likewise not be liable for any subrogation claim asserted by any reinsurer, insurer, insurance pool, or underwriting association to the extent of the applicable liability limits previously provided to such insured by the insolvent insurer.** (Emphasis by petitioner.)

By this amended definition, the insured of an insolvent insurer is immune to subrogation claims asserted by a claimant's uninsured motorist carrier to the extent of the applicable policy limits previously provided by the insolvent insurer. However, 1990 La. Acts 105 did not contain a statement of retroactivity and was determined by the Louisian Supreme Court to be substantive and to be applied prospectively only.

The Louisiana Supreme Court in *Rey* noted this obstacle to retroactive application of Act 237. To overcome this obsticle, the court held that the definition of covered claim was made retroactive in 1992 even though La. Rev. Stat. Ann. 22:1379(3)(b), covered claim, was not amended in 1992. *Rey* at 732. In effect, the Louisiana Supreme Court makes retroactive in 1992 a definition that was not amended in 1992.

Retroactive application is further not reasonable or appropriate because it may frustrate LIGA's stated purpose of avoiding financial loss to claimants because of the insolvency of an insurer. Relying on the well settled law of *Hickerson*, injured parties may have concluded litigation with uninsured motorist carriers for amounts based upon the uninsured motorist position as excess to that of LIGA. Retroactive application of Act 237 would penalize the plaintiff for settling with an uninsured motorists carrier without fully exhausting uninsured motorist limits even though at the time of settlement, the uninsured motorist exposure was excess to that responsibility of LIGA.

Significant danger exists in retroactively applying legislation which goes well beyond regulation and com-

pletely transfers the obligations of one party to another. Retroactive application of Act 237 of 1992 requires statutes not amended to be held retroactive. It may further penalize parties for concluding matters based on existing laws. Therfore, retroactive application of Act 237 of 1992 is not reasonable or appropriate.

VI. Retroactive application of Act 237 of 1992 violates the due process clause of the Fourteenth Amendment.

Retroactive application of a statute violates the due process clause of the Fourteenth amendment if the statute is not supported by a legitimate legislative purpose and further by rational means. *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984).

As stated in the earlier argument, no legitimate legislative purpose is identified. The legislation itself indicates that the purpose was not a retroactive effect questioned herein, but rather was a retroactive elimination of a dollar-for-dollar credit. The legislation is not furthered by rational means since, as discussed earlier, member funding could be increased rather than well settled obligaions and vested rights impaired.

CONCLUSION

Retroactive application of Act 237 of the 1992 substantially impairs the petitioner, Allstate Insurance Company's, rights and obligations. The rights and obligations of Allstate were based upon long standing and well settled law. The impairment was not a change in regulation, but rather a complete transfer of the obligations of LIGA to Allstate without consideration.

A significant and legitimate public purpose was not identified and in fact the legislation itself indicated a purpose unrelated to the purpose enunciated by the Louisiana Supreme Court. The Louisiana Supreme Court decision is contrary to the constitution of the United States and to controlling United States Supreme Court precedent. This Court should grant a writ of certiorari to correct the errors of the Louisiana Supreme Court.

Respectfully submitted,

JEFFERY P. LOZES #8921*
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(504) 581-4455
Attorney for Petitioner,
Allstate Insurancae Company

CERTIFICATE

I hereby certify that a copy of the foregoing has been mailed to:

Jacqueline A. Campbell
1013 N. Causeway Blvd.
Metairie, LA 70001
Attorney for Matthew Rey

David S. Fos
1940 I-10 Service Road
Suite 125
Kenner, LA 70065

Attorney for Wendy Guidry, Dixie Lloyds Insurance Company and Louisiana Insurance Guaranty Association (LIGA)

Attorney General
State of Louisiana
P. O. Box 94005
Baton Rouge, LA 70804

by placing same in the United States mail, first class postage prepaid, and properly addressed this 14th day of April, 1994.

JEFFERY P. LOZES

APPENDIX A

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 403-545 DIV."D"

Filed May 20, 1992

MATTHEW REY

VS.

WENDY GUIDRY, ET AL

JUDGMENT ON CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT

This matter came before the Court for argument on the 7th day of April, 1992.

PRESENT: JACQUELINE CAMPBELL, Attorney for Plaintiff;
DAVID FOS, Attorney for Defendant and Mover;
JEFFREY LOZES, Attorney for Defendant and Mover.

The motions were argued, submitted and taken under advisement.

After considering the record and applicable law and for written reasons this day assigned, the Court rules as follows:

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Partial Summary Judgment filed herein by defendant, Louisiana Insurance Guaranty Association (LIGA) be and the same is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion for Partial Summary Judgment filed herein by defendant, Allstate Insurance Company be and the same is hereby granted inasmuch as LIGA's coverage is hereby determined by the Court to be primary in this case.

JUDGMENT READ, RENDERED AND SIGNED this 20 day of May, 1992.

/s/ WALTER E. KOLLIN

JUDGE

APPENDIX B

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 403-545 **DIV."D"**

Filed May 20, 1992

MATTHEW REY

VS.

WENDY GUIDRY, ET AL

REASONS FOR JUDGMENT

Defendants Allstate and LIGA have filed cross motions for partial summary judgment in this lawsuit seeking a determination by the Court as to whether Allstate's coverage becomes primary and must first be exhausted by plaintiff prior to any payment by LIGA.

A motion for summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. LA. C. CIV. PRO ART. 966.

In support of its position that the Allstate uninsured motorist policy would become primary in this case LIGA argues that LSA-R.S., 22:1386(a) which became effective as amended in September, 1990 must be applied retroactively to this August, 1989 accident.

The Court finds that, although the statute as amended relates to the form of procedure and operation of the law, its retroactive application would nevertheless disturb plaintiff's vested right in her cause of action in this lawsuit. *Riehm v. Kellogg*, 520 So.2d 1169 (La. App. 4th Cir. 1987). Therefore, the Court finds that this statute as amended should not be retroactively applied.

Gretna, Louisiana this 20 day of May, 1992.

/s/ WALTER E. KOLLIN

JUDGE

APPENDIX C

24TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 403-545 DIV."D"

Filed Oct 5, 1992

MATTHEW REY

VERSUS

WENDY GUIDRY, ET AL

JUDGMENT

This matter came for hearing on September 28, 1992.

Present: DAVID FOS, Attorney for Defendants, Wendy Guidry, Dixie Lloyd's Insurance Company, and Louisiana Insurance Guaranty Association

JEFFREY LOZES, Attorney for Defendant, Allstate Insurance Company

JACQUELINE A. CAMPBELL, Attorney for Plaintiff, Matthew Rey

After hearing the pleadings, evidence and arguments of counsel, the court considering the law and the evidence to be in favor of the plaintiff, MATTHEW REY, and

against the defendant, LOUISIANA INSURANCE GUARANTY ASSOCIATION, for the reasons this day orally assigned,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, MATTHEW REY, and against the defendant, LOUISIANA INSURANCE GUARANTY ASSOCIATION, in the sum of TWENTY THREE HUNDRED AND NO/100 ($2,300.00) DOLLARS, with legal interest from the day of judgment until paid and for the costs of these proceedings.

JUDGMENT READ, RENDERED, AND SIGNED in open court this 5 day of Oct, 1992, at GRETNA, LOUISIANA.

/s/ WALTER E. KOLLIN

J U D G E

APPENDIX D

MATTHEW REY	:	NO. 93-CA-52
VERSUS	:	FIFTH CIRCUIT
WENDY GUIDRY, DIXIE LLOYD's AND ALLSTATE INSURANCE CO.	:	COURT OF APPEAL
	:	STATE OF LOUISIANA

APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON, NO. 403-545, DIVISION "D", HONORABLE WALTER E. KOLLIN, JUDGE

: : :

EDWARD A. DUFRENSE, JR.

JUDGE

APR 27 1993

(Panel composed of Judges Fred S. Bowes, H. Charles Gaudin and Edward A. Dufresne, Jr.)

BOWES, J. CONCURRING

JACQUELINE A. CAMPBELL, For Plaintiff-Appellee
THOMAS E. CAMPBELL
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Metairie, LA 70001

DAVID S. FOS, For Defendant-Appellee
& Defendant-Appellant
1940 I-10 Service Road, Suite 125
Kenner, LA 70065

JEFFREY P. LOZES, For Defendant-Appellee
210 O'Keefe Ave., Suite 600
New Orleans, LA 70112

REVERSED AND RENDERED

As a result of an automobile accident on August 1, 1989, Matthew Rey filed this tort lawsuit against Wendy Guidry, her liability insurer, Dixie Lloyds Insurance Company and Allstate Insurance Company, Rey's uninsured motorist carrier. Subsequently, the lawsuit was amended naming the Louisiana Insurance Guaranty Association (LIGA) in lieu of Dixie Lloyds which was liquidated, December 20, 1990. Tort liability is not at issue. The sole issue before us is whether LIGA, in lieu of Dixie Lloyds, would be primary or whether Rey's UM carrier, Allstate, would have primary coverage.

On May 20. 1992, the trial court granted a partial summary judgment in favor of Allstate, adjudging LIGA's coverage to be primary.

On October 5, 1992, after the parties stipulated as to the amount of damages, the trial court ruled in favor of Rey and against LIGA in the sum of $2,300.00

From this judgment LIGA has appealed, arguing that LSA-R.S. 22:1386 required any claimant to exhaust his UM motorist coverage before making a claim against LIGA.

The focus of this appeal is the application of Louisiana Revised Statute 22:1386, as amended.

In 1990, LSA-R.S. 22:1386 read as follows:

> "Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required first to exhaust his rights under such policy. *Such other policies of insurance shall include, but shall not be limited to, liability coverage, uninsured or underinsured motorist liability coverage or both, hospitalization and other medical expense coverage.* Any amount payable by such other insurance *shall act as a dollar for dollar credit* against any liability of the association under this part."

By amendment in 1992, the Statute reads as follows:

> Section 2. R.S. 22:1386(A) and (C) are hereby amended and reenacted and R.S. 22:1386(D) is hereby enacted to read as follows:

§ 1386. Nonduplication of recovery

A. Any person having a claim against an insurer under any provision in an insurance policy, other than a policy of an insolvent insurer which is also a covered claim, shall be required first to exhaust his rights under such policy. Such other policies of insurance shall include but shall not be limited to liability coverage, uninsured or underinsured motorist liability coverage, or both, hospitalization, and other medical expense coverage. As to the association, any amount payable by such other insurance shall act as a credit against the damages of the claimant, and the association shall not be liable for such portion of the damges of the claimant.

C. Any recovery under this Part by any claimant not a resident of the state of Louisiana at the time such claim arose, shall not exceed the lesser of the recovery allowed under this Part or that payable by the insurance guaranty association or its equivalent in the claimant's state of residence. As to the association, any amount payable by the other guaranty association or its equivalent shall act as a credit against the damages of the claimant, and the association shall not be liable for that portion of the damages of the claimant.

D. The association shall have no duty to provide a separate defense at its cost to an insured of an insolvent insurer as to any issue arising out of the coverage of this Section.

> Section 3. This Act shall apply to all covered claims as defined in R.S. 22:1379, pending on or arising on or after the effective date of this Act. (Emphasis added)
>
> Section 4. This Act shall become effective upon signature by the governor, or if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided in Article III, section 18 of the Constitution of Louisiana. If vetoed by the governor and subsequently approved by the legislature, this Act shall become effective on the day following such approval.

In this case, R.S. 22:1386, as amended, does not diminish Rey's right to recover, merely establishes a new procedure for his recovery. The amended statute creates procedural rights and affords curative measures as expressed by our Legislature. In light of the juisprudence interpreting the earlier version of the Statute, the amendments to R.S. 22:1386 are procedural and interpretive. *Hickerson v. Protective National Insurance Company,* 383 So.2d 377 (La. 1980). Interpretive legislation does not create a new rule but simply establishes legislative intent as to the meaning of the statute from its inception. *Ardoin v. Harford Fire Indemnity Company,* 360 So. 2d 1331 (La. 1978).

Under the present circumstances, any right Rey may have had against LIGA on the date of the accident was conditional, contingent that Dixie Lloyds be liquidated before a claim against LIGA would be viable. In *Richoh v. Van Gundy,* 461 So.2d 458 (La. App. 5th Cir. 1984) we

stated that a right is vested when:

> ..."the right to enjoyment, present, or perspective, has become property of some particular person or persons as a present interest. The right must be absolute, complete and unconditional, independent of any contingency, and a mere expectancy of future benefit or contingent interest in property...does not constitute a vested right."

The time for vesting of rights is the date of insolvency of Dixie Lloyds, December 20, 1990. As of this date, the statutory scheme defining Rey's rights to proceed against his UM insurer and LIGA's obligation to pay a claim was in effect.

If LIGA is held liable for claims arising before its existence, because liability is determined as of the date of an insurer's liquidation, it should also hold, when the legislature amends LIGA's potential liability; we should use the date of liquatation to determine liability. *LIGA v. Guglielmo,* 276 So.2d 720 (La. App. 1st Cir. 1973).

We do not find Rey's vested rights impaired. In order to fall within the ambit of constitutional protection and the prohibition against divestiture of vested rights, a law must create new obligations, impose new duties, or attach new disability to a contract in existence when the law becomes effective. We find no impediments in this case.

Furthermore, the State, acting through our legislature has exercised its protective powers. The 1992 amendment to R.S. 22:1386, was designed to produce a legitimate end, and measures taken were reasonable .and

appropriate to protect the citizenry of this State from economic harm and injury. Requiring claimants to exhaust their remedies through claims against their UM motorist insurer before asserting them against LIGA is a legitimate goal which does not infringe upon constitutional rights or protection. LIGA was statutorily created, and embodied by sovereign authority of our State to limit economic exposure when it is necessary to protect the security of our citizenry.

We find that Rey's claim was still pending, thus under the provisions of R.S. 22:1386, as amended by Act 237 of 1992, LIGA's responsibility is subordinate to Allstate's UM coverage. Accordingly, we disagree with the trial court and reverse. At the time the trial court ruled, it should have considered the retroactive application of R.S. 22:1386. We find the adjudication vis-a-vis Allstate was not final until October 5, 1992, therefore did not relieve Allstate of its primary responsibility for Rey's damages. The claim in this case was a "pending claim" within the purview of Section 3 of Act 237 of 1992, amending R.S. 22:1386, and because the Legislature intended the statute to be retroactive Allstate shall be primary.

Accordingly, for the reasons set forth above, we reverse the trial court's judgment against LIGA, and hold the UM insurer, Allstate responsible for Rey's damages.

REVERSED AND RENDERED

APPENDIX E

SUPREME COURT OF LOUISIANA

93-C-1271

Jan 14 1994

ANDREA E. SEGURA

v.

MELISSA A. FRANK, et al.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL, THIRD CIRCUT

consolidated with

93-C-1401

MATTHEW REY

v.

WENDY GUIDRY, et al.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL FIFTH CIRCUIT

KIMBALL, Justice.*

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* Pursuant to Rule IV, Part 2, § 3 of the rules of the Supreme Court of Louisiana, Marcus, J., was not on the panel which heard and decided this case. See the footnote in *State v. Barras*, 615 So.2d 285, 286 n.1 (La. 1993).

The issue in these consolidated cases is whether either of two amendments to La. R.S. 22:1386, the "non-duplication of recovery" provision of Louisiana's Insurance Guaranty Association Law, apply to claims arising from accidents which occurred prior to the effective dates of the amendments. The courts of appeal reached opposite conclusions in these cases, while other appellate courts have rendered conflicting decisions on the same issue as well. We granted writs to resolve the split of opinion among the circuits.

FACTS

On August 1, 1986, Matthew Rey was injured when his car was struck by an automobile driven by Wendy Guidry. Rey filed suit on July 30, 1990 against Guidry, Dixie Lloyds Insurance Company as Guidry's liability insurer, and Allstate Insurance Company as Rey's uninsured motorist (UM) carrier. After Dixie Lloyds was liquidated on December 20, 1990, Rey amended the petition to name the Louisiana Insurance Guaranty Association (LIGA) as Dixie Lloyds' successor.

Andrea Segura was injured on March 12, 1990 when she was struck in a pedestrial crosswalk by an automobile driven by Russel Goodie and owned by Melissa Frank. Segura filed suit on March 4, 1991 against Goodie, Frank, American Manufacturers Mutual Insurance Company (American) as Segura's UM carrier, and LIGA as successor to Dixie Lloyds, the liability insurer of the Frank vehicle on the date of the accident.

In both cases, LIGA argued La. R.S. 22:1386, as

amended by Act 130 of 1990 and which had become effective on September 7, 1990,[1] required the plaintiffs to exhaust their UM coverages before recovering against LIGA. Both trial courts disagreed with LIGA, applied the law as it existed prior to the amendment, and held LIGA primes the plaintiffs' UM insurers. LIGA appealed both judgments, this time arguing in the alternative that even if Act 130 of 1990 did not apply to plaintiff's claims, Act 237 of 1992 did apply. The 1992 Act had again amended and reenacted La. R.S. 22:1386 with only one change pertinent to these cases: Section 3 of the Act provided that the amendment applied to all covered claims pending on the effective date of the Act, June 10, 1992.[2] LIGA thus argued on appeal the 1992 amendment applied to plaintiffs' "pending" claims and therefore its oblgations to plaintiffs were subordinate to the obligations of plaintiffs' UM insurers. In response to LIGA's arguments, American and Allstate argued retroactive application of either Act 130 of 1990 or Act 237 of 1992 would violate the due process and contract clauses of the federal and state constitutions by impairing their contractual obligations under the UM policies and by disturbing Rey's and Segura's vested rights against LIGA.

In *Segura v. Frank,*[3] the Louisiana Third Circuit of Appeal affirmed the judgment of the trial court. Rejecting LIGA's argument that Act 130 of 190 applied, the court concluded the 1990 amendment was substantive and

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[1] *See infra* text accompanying notes 10-15.

[2] *See infra* note 15 and accompanying text.

[3] 615 So.2d 516 (La. App. 3d Cir. 1993).

therefore should apply prospectively only.[4] The court reasoned that Segura's claim against Dixie Lloyds was a vested property right which arose prior to the effective date of the 1990 amendment. Thus, reasoned the court, retroactive application of the amendment to the date of the accident would distrurb Segura's vested right in a cause of action against LIGA as Dixie Lloyds' successor.[5] To avoid that result, the court applied the prior version of La. R.S. 22:1386 as interpreted by this court in *Hickerson v. Protective National Insurance Co.*, 383 So.2d 377, 379 (La. 1980), where we construed the law "to deem LIGA the insurer with all the obligations of the insolvent insurer." The *Segura* court further reasoned that this case was analogous to the situation in *St. Paul Fire and Marine Insurance Co. v. Smith*, 609 So.2d 809, 813 (La. 1992), where we classified as substantive an amendment which was "an obvious legislative attempt to change the law as construed by this court."

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[4] The fourth circuit also had concluded Act 130 of 1990 was substantive and applied prospectively only in *Dangerfield v. Soto*, 599 So.2d 1092 (La. App. 4th Cir. 1991), a case involving nearly identical facts.

[5] *See Cole v. Celotex Corp.*, 599 So.2d 1058, 1063 and n.15 (La. 1992) ("Once a party's cause of action accrues, it becomes a vested property right that may not constitutionally be divested," and "Under Louisiana law, a cause of action accrues when the party has the right to sue"); *Terrebonne v. South Lafourche Tidal Control Levee Dist.*, 445 So.2d 1221, 1224 (La. 1984) ("The Legislature simply cannot taken away an existing cause of action based upon substantive rights which had clearly been granted by legislation during the preceding session and had become vested on the effective date of the legislation"); *Burmaster v. Gravity Drainage Dist. No.2*, 366 So.2d 1381, 1387 (La. 1978) ("Where an injury has occurred for which the injured party has a cause of action, such cause of action is a vested property right which is protected by the guarantee of due process"); *Lott v. Haley*, 370 So.2d 521, 524 (La. 1979) (same).

Regarding LIGA's alternative argument that the 1992 amendment applied, the court of appeal first noted Act 237 of 1992 had not yet been passed at the time of the proceedings in the trial court, therefore the Act "could not have been considered by the trial judge, much less applied to these proceedings." The court reasoned that "in the normal scheme of events" the applicability of the 1992 amendment should not be argued for the first time on appeal. Despite this reasoning, the court went on to find that "in any event" the trial court's judgment "relieved American of responsibility for the first $10,000 of plaintiff's damages and to that extent constitutes an adjudicated claim." The court concluded that "under the particular circumstances of this case, the claim in this matter is not a '"pending claim"' within the purview of Section 3 of Act 237 of 1992."

In the second case, *Rey v. Guidry*,[6] the Louisiana Fifth Circuit Court of Appeal reversed the trial court's judgment. Contrary to the reasoning of the third circuit in *Segura*, the fifth circuit in *Rey* determined both amendments to La. R.S. 22:1386 were procedural and interpretive rather than substantive. According to the fifth circuit, the amended statute is procedural because it "does not diminish Rey's right to recover, merely establishes a new procedure for his recovery." Additionally, the court found the amendments did not create a new rule but simply established legislative intent as to the meaning of the statute from its inception. The amendments therefore were interpretive '[i]n light of the jurisprudence interpreting the earlier version of the Statute," referring to this court's

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[6] 618 So.2d 425 (La. App. 5th Cir. 1993).

decision in *Hickerson.*

The court in *Rey* also determined that the "time for vesting of rights" was the date of Dixie Lloyds' insolvency, which occurred after the 1990 amendment's effective date, as opposed to the date of the accident, which occurred prior to that date.[7] Finding that "any right Rey may have had against LIGA on the date of the accident was conditional, contingent that Dixie Lloyds be liquidated before a claim against LIGA would be viable," the court concluded Rey had no vested right in a cause of action against LIGA on the effective date of the 1990 amendment. Thus, Rey's vested rights would not be impaired by application of the amended statute to his claim.

Finally, the *Rey* court determined Rey's claim was "pending" in the trial court on the effective date of Act 237 of 1992 and therefore the 1992 amendment applied retroactively to his claim pursuant to Section 3 of the Act.[8] The court reasoned that because "LIGA was statutorily created, and embodied by sovereign authority of our State to limit economic exposure when it is necessary to protect the security of our citizenry," the legislature's enactment

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[7] In a concurrence to the *Rey* opinion, Judge Bowes noted the first circuit previously had held the date of Dixie Lloyds' insolvency governed the law to be applied in a case involving nearly identical facts. *See Hebert v. Liner,* 620 So.2d 294 (La. App. 1st Cir. 1993); *see infra* text accompanying notes 18-19.

[8] Although the trial court had granted a partial summary judgment in favor of Allstate on May 20, 1992, prior to the June 10, 1992 effective date of the Act, the court of appeal found the adjudication vis-a-vis Allstate was not final until October 5, 1992, the date the trial court ruled in favor of Rey and against LIGA. "At the time the trial court ruled," stated the court, "it should have considered the retroactive application of R.S. 22:1386."

of Act 237 of 1992, including the retroactivity provision in Section 3, was a legitimate exercise of the state's protective powers. Applying La. R.S. 22:1386(A) as amended by the 1992 Act, the court held Allstate's UM coverage primes LIGA's coverage of Rey's claim.

Allstate applied to this court for review of the fifth circuit's decision in *Rey* LIGA applied for review of the third circuit's decision in *Segura*. We granted both applications and consolidated the two cases.[9]

LAW

The Louisiana Insurance Guaranty Association Law (LIGA Law)[10] states its purpose as follows:

> The purpose of this Part is to provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies and to allow the association to provide financial assistance to member insurers under rehabilitation or liquidation, and to provide an association to assess the cost of such operations among insurers.

La. R.S. 22:1376.

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[9] 620 So.2d 822 (La. 1993).

[10] La. R.S. 22:1375-1374.

To achieve the LIGA Law's stated purpose, the legislature created LIGA as a private nonprofit unincorporated legal entity governed by a board of directors and composed of "member insurers." La. R.S. 22:1380(A). "member insurer" is defined as any person who "[i]s licensed and authorized to transact insurance in this state" and who has written at least one policy of insurance since September 1, 1970, the effective date of the LIGA Law. La. R.S. 22:1379(5). All member insurers "shall be and remain members of the association as a condition of their authority to transact insurance in this state." La. R.S. 22:1380(A).

La. R.S. 22:1382 defines LIGA's powers and duties in pertinent part as follows:

> A. The association shall
>
> (1)(a) Be obliged to the extent of the covered claims existing prior to the determination of the insurer's insolvency, or arising after such determination....
>
> (2) Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent....

At the time of each accident in these cases, La. R.S. 22:1379(3) defined a "covered claim" as

> an unpaid claim, including one for unearned premiums by or against the insured or agent, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Part applies issued

> by an insurer, if such insurer becomes an insolvent insurer after September 1, 1970, and (a) the claimant or insured is a resident of this state at the time of the insured event; or (b) the property from which the claim arises is permanently located in this state. "Covered claim" shall not include any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise. "Covered claim" shall not include any amount due under or arising from a bail bond contract.

Also at the times of the accidents, the "nonduplication of recovery" provision, La. R.S. 22:1386, provided in pertinent part:

> **§ 1386. Nonduplication of recovery**
>
> (1) Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his right under such policy . Any amount payable on a covered claim under this Part shall be reduced by the amount of any recovery under such insurance policy.

According to this court in *Hickerson v. Protective National Insurance Co. v. Smith*, 383 So.2d 377, 379 (La. 1980), La. R.S. 22:1386 "was designed to apply to ordinary insurance coverage and not to uninsured motorist coverage, which is required by public policy." Noting the stated purpose of the LIGA Law is "to avoid financial loss to claimants or policyholders,"[11] the court reasoned this purpose would be thwarted by requiring an injured party to

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[11] *See* La. R.S. 22:1376, *supra*.

proceed first against his or her own UM insurer—once the injured claimant recovered from his UM insurer, the UM insurer would be subrogated to the claimant's rights against the unprotected policyholder of the insolvent insurer.[12] The court thus held that the only statutory interpretation which would effect the purpose of the LIGA Law would be "to deem LIGA the insurer with all the obligations of the insolvent insurer." *Hickerson*, 383 So.2d at 379 (citing La. R.S. 22:1382(1)).[13] The court also reasoned that because the insolvent insurer was "able to make payment by dint of its membership in the Louisiana Insurance Guaranty Association," therefore the tortfeasor's automobile was not an "uninsured motor vehicle" within the meaning of La. R.S 22:1406(D)(2)(a).[14] *Id.* at 380.

Ten years after the decision in *Hickerson* and shortly after the accidents in these cases, the legislature passed Act 130 of 1990, which amended La. R.S. 22:1386 to read as follows:

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[12] *See Bond v. Commercial Union Assur. Co.*, 407 So.2d 401, 408 (La. 1981) (on rehearing) ("We conclude that upon payment an insurer, pursuant to a subrogation agreement contained in its policy, becomes conventionally subrogated to its insured's right against the uninsured tortfeasor").

[13] *See* La. R.S. 22:1382(1). *supra.*

[14] La. Rev. Stat. 22:1406(D) is the UM statute. La. R.S. 22:1406(D)(2)(a) provides:

> For the purpose of this coverage, the terms "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency.

§ 1386. Nonduplication of recovery

(1) Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required first to exhaust his rights under such policy. *Such other policies of insurance shall include but shall not be limited to liability coverage, uninsured or underinsured motorist liability coverage, or both hospitalization, and other medical expense coverage.* Any amounts payable by such other insurance shall act as a dollar-for-dollar credit against any liability of the association under this Part.

(emphasis added.) In direct contrast to prior law as construed by this court in *Hickerson*, the 1990 amendment to La. R.S. 22:1386 clearly required an injured claimant to first exhaust his UM coverage before recovering against LIGA.

In the same legislative session, the legislature also addressed the *Hickerson* court's concern that in the event the claimant would be required to exhaust his or her UM coverage before proceeding against LIGA, then the UM insurer would assert the claimant's subrogated claim against the unprotected policyholder of the insolvent insurer. In Act 105 of 1990, the legislature amended the definition of the term "covered claim" in La. R.S. 22:1379(3) in pertinent part by adding the following italicized language:

> (b) "Covered claim" shall not include any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise. *In addition, the insured of an insolvent insurer shall likewise not be liable for any subrogation claim asserted by any reinsurer, insurer, insurance pool, or underwriting*

> *association to the extent of the applicable liability limits previously provided to such insured by the insolvent insurer.*

(emphasis added.) Under the amended definition, the insured of an insolvent insurer is immune to subrogation claims asserted by a claimant's UM insurer to the extent of the applicable policy limits previously provided by the insolvent insurer, thus effecting the LIGA Law's purpose of avoiding "financial loss to claimants or policyholders because of the insolvency of an insurer." La. R.S. 22:1376.

Both 1990 amendments became effective on June 29, 1990. Two years later, the legislature again amended La. R.S. 22:1386, the "nonduplication of recovery" provision, by Act 237 of 1992. In that Act, the only change pertinent to these cases is contained in Section 3 of the Act, which provides: "This Act shall apply to all covered claims, as defined in R.S. 22:1379, *pending on or arising on or after the effective date of this Act*" (emphasis added).[15] Act 237 of 1992 became effective on June 10, 1992.

ANALYSIS

These cases require us to decide (1) whether La. R.S.

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[15] Section 2 of Act 237 of 1992 amended La. R.S. 22:1386 by adding subsection (C), relating to recovery by nonresidents, and subsection (D), relating to LIGA's duty to defend as to certain issues arising out of the coverage under La. R.S. 22:1386. Section 2 also repealed the "dollar-for-dollar credit" added to La. R.S. 22:1386(1) in Act 130 of 1990 and substituted the following sentence in La. R.S. 22:1386(A): "As to the association, any amount payable by such other insurance shall act as a credit against the damages of the claimant, and the association shall not be liable for such portion of the damages of the claimant."

22:1386 as amended by Act 130 of 1990 applies to the plaintiff's claim in each case, or (2) if not, whether the statute as amended by Act 237 of 1992 applies.

In determining whether laws may be applied retroactively, we are guided by La. C.C. art. 6, which provides:

> In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretive laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary.[16]

This court recently explained the application of La. C.C. art. 6 in *Cole v. Celotex Corp.*, 599 So.2d 1058, 1063 (La. 1992):

> LSA-C.C. Art. 6 requires that we engage in a two-fold inquiry. First, we must ascertain whether in the enactment the legislataure expressed its intent regarding retrospective or prospective application. If the legislature did so, our inquiry is at an end. If the legislature did not, we must classify the enactment as substantive, procedural or interpretive.

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[16] See also La. R.S. 1:2, which provides: "No Section of the Revised Statutes is retroactive unless it is expressly so stated." According to this court's consistent interpretation, the general rule of prospective application applies only to substantive laws as distinguished from merely procedural or remedial laws, which will be given retroactive effect in the absence of language showing a contrary intention. *See St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So.2d 809, 816 (La. 1992); *Lott v. Haley*, 370 So.2d 521, 523 (La. 1979); *Ardoin v. Hartford Acc. & Indem. Co.*, 360 So.2d 1331 (La. 1978); *General Motors Acceptance Corp. v. Anzelmo*, 222 La. 1019, 64 So.2d 417 (1953).

Additionally, this court has observed that the principle contained in La. C.C. art. 6 has constitutional implications under the due process and contract clauses of both the United States and Louisiana Constitutions.[17] *See St. Paul Fire & Marine Ins. Co. v. Smith,* 609 So.2d 809, 816 n.11 (La. 1992); *Board of Comm'rs v. Dept. of Natural Resources,* 496 So.2d 281, 291 (La. 1986); *Cahn v. Cahn,* 468 So.2d 1176, 1181 (La. 1985); *Graham v. Sequoya Corp.,* 478 So.2d 1223, 1226 (La. 1985); *Terrebonne v. South Lafourche Tidal Control Levee Dist.,* 445 So.2d 1221, 1224 (La. 1984); *Block v. Reliance Ins. Co.,* 433 So.2d 1040, 1044 (La. 1983), *Lott v. Haley,* 370 So.2d 521, 523 (La. 1979); *Burmaster v. Gravity Drainage Dist. No. 2,* 366 So.2d 1381, 1387 (La. 1978). Thus, even where the legislature has expressed its intent to give a substantive law retroactive effect, the law may not be applied retroactively if it would impair contractual obligations or disturb vested rights. *Id.*

Accordingly, for either amendment to apply to plaintiffs' claims in these cases, it must meet the foregoing requisites.

(1) The 1990 Amendment

Rey and Segura were injured on August 1, 1989 and March 12, 1990, respectively; Act 130 of 1990, amending La. R.S. 22:1386, became effective on June 29, 1990; and Dixie Lloyds, the tortfeasors' liability insurer, was declared insolvent on December 20, 1990. Under La. R.S. 22:1386 as it existed on the dates of the accidents, Rey and Segura would be entitled to proceed immediately against

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[17] U.S. Const. amend. XIV, § 1: U.S. Const. art. I, § 10[1]; La. Const. art. I, § 2; La. Const. art. I, § 23.

LIGA as Dixie Lloyds' successor. Under the statute as it existed on the date of Dixie Lloyds' liquidation, they would first have to exhaust their UM coverages with American and Allstate before proceeding against LIGA.

(a) Retroactive Effect of the Amendment

LIGA argues the issue in these cases is not whether the 1990 amendment should be given retroactive or prospective effect, but whether the law as it existed on the dates of the accidents or on the date of Dixie Lloyds' liquidation should apply. According to LIGA, retroactivity is not at issue because neither Rey nor Segura could have a vested right in a cause of action against LIGA until Dixie Lloyds was declared insolvent, which occurred after the amendment's effective date.[18] Thus, argues LIGA, the only rights affected by the amendment are those which arose after the amendment became effective. As LIGA points out, the court of appeal in *Rey* employed similar reasoning to conclude that on the effective date of the amendment, Rey had no vested rights against LIGA to be impaired. LIGA also points out that its position was upheld by the first circuit in *Hebert v. Liner*, 620 So.2d 294, 296 (La. App. 1st Cir. 1993), a case on all fours with the present cases, where the court stated:

> La.R.S. 22:1386 does not purport to affect plaintiff's rights against the insurer itself. It governs plaintiff's rights against LIGA. Until Dixie Lloyds was declared insolvent, plaintiff had no

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[18] For this court's pronouncements concerning when a "vested right" exists in this context, see *supra* note 5.

> vested rights against LIGA, although he may have had vested rights against Dixie Lloyds. The court finds, therefore, that the law as it existed at the time Dixie Lloyd's was declared insolvent must govern LIGA's obligation. This interpretation of La.R.S. 22:1386 does not give the amendment retroactive effect.

In further support of its position that the 190 amendment would not operate retroactively in the present cases, LIGA relies primarily on *LIGA v. Guglielmo,* 276 So.2d 720 (La. App. 1st Cir.), *writ denied,* 279 So.2d 690 (1973).[19] In *Guglielmo,* the first circuit held LIGA liable for claims against two insurers declared insolvent after the effective date of the Act which created LIGA even though the claims arose prior to the Act's effective date. Finding that

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[19] LIGA also cites *Cooper v. Huddy,* 581 So.2d 723 (La. App. 1st Cir.), *writ denied,* 585 So.2d 552 (1991), and *Prejean v. Dixie Lloyds Ins. Co.,* 602 So.2d 764 (La. App. 3d Cir. 1992). In *Cooper,* the court of appeal held LIGA liable up to the $150,000.00 statutory cap in effect on the date of the insurer's insolvency rather than the $50,000.00 statutory cap in effect on the date of the accident. In *Cooper,* however, the statutory cap did not implicate any party's rights and obligations which arose prior to the declaration of the insurer's insolvency. In contrast, La. R.S. 22:1386 purports to affect not only rights and obligations which arise upon an insurer's insolvency but also claimants' and UM insurers' rights and obligations under previously existing UM polices.

Similarly, in *Prejean,* the court of appeal applied the law in effect on the date of the insurer's liquidation to limit LIGA's exposure to court costs resulting from an accident which occurred prior to the effective date of the law. Again, the statute at issue in *Prejean* did not affect any party's pre-insolvency rights or obligations because LIGA's obligation to pay court costs did not arise until the insurer was declared insolvent. A UM insurer's rights and obligations under a UM policy, on the other hand, arise at the time the policy is issued, which occurred prior to Dixie Lloyds' insolvency in each of the present cases. Thus, we find both *Cooper* and *Prejean* distinguishable from these cases.

claims do not "become the liability of the Association until and unless an insurer is decreed insolvent," the appellate court concluded "the Act intends that the decreeing of an insurer insolvent after its effective date is the sole operative factor upon which the Associations' liability attaches." *Id.* at 726. The court reasoned that under this interpretation, the Act would operate "prospectively only because, by its own terms, it applies solely to insolvencies decreed subsequent to the date it becomes effective." *Id.*

While we express no opinion regarding the correctness of the first circuit's decision in *Guglielmo,* we note significant factual distinctions between that case and these cases. In *Guglielmo,* the court observed that under the facts of that case, application of the Act would not "create any new obligation or exposure, either in character or amount, *upon any Association member under its own policies.*" *Id.* at 727 (emphasis added). In contrast, application of the 1990 amendment in the present cases would impose new obligations upon two LIGA members, American and Allstate, under the UM policies which were in effect on the dates of the accidents.

Thus, we disagree with LIGA's contention that application of the 1990 amendment to Rey's and Segura's claims would operate prospectively only. LIGA's reasoning, as well as the reasoning of the fifth circuit in *Rey* and the first circuit in *Hebert,* fails to take into account the amendment's effects on the existing rights and obligations of the UM insurers.[20] Those rights and obligations arose

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[20] We note neither the third circuit in *Segura* nor the fourth circuit in *Dangerfield, supra,* considered the 1990 amendment's effect on the UM insurers' rights and obligations, although both courts concluded the

not on the date of insolvency, nor on the dates of the accidents, but on the dates the UM policies were issued. As we state in *Block v. Reliance Ins. Co.*, 433 So.2d 1040, 1044 (La. 1983) (emphasis added):

> Where the statute in question was not in effect *at the time of contracting,* it cannot be retroactively applied to alter the obligations of that contract, *even though the act giving rise to the obligation occurs after the effective date of the statute.*[21]

Here, at the times the American and Allstate UM policies were issued, La. R.S. 22:1386 and *Hickerson* limited the UM insurers' liability under those policies to claims in excess of a tortfeasor's liability insurance coverage even in the event of the insolvency of the tort-

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(footnote 20 continued)

amendment would retroactively disturb the plaintiffs' vested rights against LIGA as Dixie Lloyds' successor. *See supra* note 4 and accompanying text.

[21] In *Block*, UM polices had been issued to plaintiffs prior to an amendment to La. R.S. 22:1406(D) allowing insurers to prohibit "stacking" of UM coverage, though in both consolidated cases the accidents had occurred after the amendment's effective date. The UM insurers argued that the law in effect on the dates of the accidents gave effect to provisions in the policies which purported to bar stacking. We rejected that argument with the following reasoning:

> The obligations assumed by the insurers in both cases were assumed against a backdrop of R.S. 22:1406(D) before the anti-stacking amendment was passed. *At the time the policies were issued* the insurers knew that they were subjected to the risk of stacking of multiple UM coverages, in spite of the policy provisions.

Id. (emphasis added).

Under *Block*, therefore, the relevant time for determining whether a change in the law retroactively affects an insurer's or insured's rights and obligations *is when the policy is issued.*

feasor's insurer. If however, the 1990 amendment to La. R.S. 22:1386 is applied, under those same policies the UM insurers would be primarily liable for plaintiffs' claims against Dixie Lloyds. In other words, the amendment would retroactively increase the UM insurers' obligations under the policies. Moreover, because generally a statute cannot be retroactively applied to alter the obligations of a contract "even though the act giving rise to the obligation occurs after the effective date of the statute," *Id.*, the fact that Dixie Lloyds' liquidation occurred after the effective date of the amendment does not preclude our finding that application of the 1990 amendment would retroactively increase the UM insurers' obligations under policies issued prior to the amendment's effective date.

Thus, we conclude 130 of 1990 would operate retroactively in these cases.

(b) Classification of the Amendment as Procedural, Interpretive, or Substantive

Having settled that the 1990 amendment would have retroactive effect on American's and Allstate's obligations under the UM policies, we now must determine whether retroactive application of the statute is permissible. The first inquiry under La. Civ. Code art. 6 and *Cole, supra*, is whether the legislature expressed its intent regarding retroactive or prospective application. In Act 130 of 1990, the legislature expressed no such intent. The next inquiry, therefore, is whether the enactment is substantive, procedural, or interpretive.

Substantive laws establish new rules, rights, and

duties or change existing ones. *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So.2d 809, 817 (La. 1992); *Ardoin v. Hartford Acc. & Indem. Co.*, 360 So.2d 1331, 1339 (La. 1978). Procedural laws prescribe a method for enforcing a substantive right and relate to the form of the proceeding or the operation of the laws. *Graham v. Sequoya Corp.*, 478 So.2d 1223, 1226 (La. 1985); *Terrebonne v. South Lafourche Tidal Control Levee Dist.*, 445 So.2d 1221, 1224 (La. 1984). Interpretive laws merely establish the meaning the interpreted statute had from the time of its enactment. *St. Paul Fire & Marine*, 609 So.2d at 817; *Ardoin*, 360 So.2d at 1339.

The court of appeal in *Rey* found the 1990 amendment to La. R.S. 22:1386 procedural because it merely established a new procedure for Rey's recovery without diminishing his right to recovery. The court of appeal in *Segura*, on the other hand, found the amendment substantive because "a retroactive application would disturb plaintiffs' vested property right, *i.e.*, a cause of action in favor of the injured parties." While we agree with the *Segura* court that a "cause of action is a vested property right which is protected by the guarantee of due process," *Burmaster v. Gravity Drainage Dist. No. 2*, 366 So.2d 1381, 1387 (La. 1979),[22] we find retroactive application of the 1990 amendment in these cases would disturb neither plaintiff's vested right in a cause of action against the party or parties legally liable for their injuries. From the plaintiffs' standpoint, the amendment alters the order of recovery from defendants without disturbing the *right* to

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[22] *See supra* note 5.

recover.[23] In other words, the amendment merely prescribes a method of enforcing the plaintiff's rights to recover. Accordingly, insofar as the 1990 amendment's effect on plaintiffs' rights is concerned, we agree with the *Rey* court's conclusion that the amendment is procedural.

Again, however, we note neither the *Rey* nor the *Segura* court considered the 1990 amendment's effect on UM insurers' rights and obligations.[24] As previously determined, the 1990 amendment would retroactively affect Allstate's and American's substantive contractual rights by increasing their obligations to plaintiffs under existing UM policies. Thus, even though the 1990 amendment would affect plaintiffs' procedural rights only and not their substantive rights the amendment clearly would affect the UM insurers' substantive rights. The amendment therefore is not "merely procedural" and the court of appeal in *Rey* erred in finding otherwise.

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[23] Actually, plaintiffs would have greater rights against the UM insurers than they would against LIGA. A "covered claim" against LIGA, for example, "shall not include any claim based on or arising from a pre-insolvency obligation of an insolvent insurer, including but not limited to contractual attorneys' fees and expenses, statutory penalties and attorneys' fees, court costs, interest and bond premiums, or any other expenses incurred prior to the determination of insolvency." La. R.S. 22:1379(3)(d). Additionally, LIGA's obligation to a claimant is subject to a $100.00 deductible and a maximum limit of $150,000.00 per claim and $300,000.00 per accident or occurrence. La. R.S. 22:1382(A)(1)(a). Because retroactive application of La. R.S. 22:1386 as amended by Act 130 of 1990 or as amended by Act 237 of 1992 would have the effect of removing the foregoing limitations from plaintiffs' claims by permitting them to exhaust their UM coverages before proceeding against LIGA, we need not decide whether legislation *imposing* such limitations on pre-existing claims would be substantive or would unconstitutionally disturb a claimant's vested rights.

[24] *See supra* note 20 and accompanying text.

The loser court in *Rey* also found the 1990 amendment interpretive. The court reasoned that the amendment did not create a new rule but simply established the meaning La. R.S. 22:1386 had from the time of its original enactment in 1970. Thus, the *Rey* court suggested the amendment merely "legislatively overruled" this court's interpretation of the statute in *Hickerson.*[25] If the *Rey* court is correct that the 1990 amendment is merely interpretive, then the amendment "cannot properly be said to divest vested rights [or impair contractual obligations], because, under civilian theory, such legislation does not violate the principle of non-retroactivity of laws.... It is the original statute, not the interpretive one, that establishes rights and duties." *Gulf Oil Corp. v. State Mineral Bd.*, 317 So.2d 576, 591 (La. 1975) (citing 1 M. Planiol, Treatise on the Civil Law, § 251 at 179 (La. St. L. Inst. trans. 1959), and A. Yiannopoulos, Louisiana Civil Law System, § 32.5 at 18 (1975 Supp.)).[26]

This court considered the nature of interpretive legislation in *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So.2d 809 (La. 1992). In that case, the issue was whether an amendment to La. R.S. 23:1103(B) of the Louisiana Worker's Compensation Law was interpretive or substantive. The court noted that prior to the amendment, " 'existing' Louisiana law as interpreted and construed by the state's highest court unequivocally recognized the employee's right to retain his general damage award by

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[24] *See supra* note 20 and accompanying text.

[25] *Cf. McMahon v. LIGA*, 596 So.2d 1384, 1391 (La. App. 1st Cir. 1992) (finding the 1990 amendment to La. R.S. 22:1386 *substantive* to the extent it overruled *Hickerson*).

[26] *See also St. Paul Fire & Marine*, 609 So. 2d at 817; *Ardoin*, 360 So.2d at 1338-39.

excepting that award from the employer's preferential right to reimbursement." *Id.* at 820. The court then held the legislature's amendment of that law to give an employer first payment for worker's compensation paid out of *any* damages recovered by an employee from a third party was "clearly substantive in that it significantly alters the respective rights of the injured employee and the employer (or compensation insurer)." *Id.* Reaffirming the principle that " '[a] statute that changes *settled law* relative to substantive rights only has prospective effect,' " the court observed that "while there is a category of legislation labeled 'interpretive,' legislation that changes settled law falls outside of that category." *Id.* (quoting Gilboy v. American Tobacco Co., 552 So.2d 1263, 1265 (La. 1991) (emphasis supplied by quoting court)). In concluding the amendment to La. R.S. 23:1103(B) was substantive, the court found it significant that the amendment was a delayed rather than a "prompt" legislative response to this court's previous interpretations of the statute, that the parties had relied on the line of jurisprudence interpreting the statute, and that the amendment was part of an overall revision of the worker'-s compensation laws. *Id.* at 820-21.

When American and Allstate issued the UM policies to Segura and Rey, La. R.S. 22:1386 as construed by this court in *Hickerson* recognized a UM insurer's right to rely on LIGA's coverage of an insured's claims in the event a tortfeasor's liability insurer was declared insolvent. The legislature's amendment of that statute, if applied in these cases, would significantly alter the respective rights and obligations of LIGA and the UM insurers by making the UM insurers primarily liable for plaintiff' claims against Dixie Lloyds. Furthermore, prior to the 1990 amendment

to La. R.S. 22:1386, the *Hickerson* court's interpretation of the statute had been the law of this state for over a decade. For these reasons, we conclude the 1990 amendment changed settled law relative to American's and Allstate's substantive rights and therefore falls outside the category of interpretive legislation. Additionally, we note that at the same time the legislature amended La. R.S. 22:1386, it also amended the definition of "covered claim" in La. R.S. 22:1379(3) in order to protect policyholders of insolvent insurers against subrogation claims asserted by claimants' UM insurers.[27] If the amendment to La. R.S. 22:1386 had been merely interpretive, there would have been no reason to amend La. R.S. 22:1379(3) in order to protect policyholders who previously had no exposure to such subrogation claims.

In sum, the 1990 amendment to La. R.S. 22:1386 is neither procedural nor interpretive but substantive. Since the legislature expressed no intent in Act 130 of 1990 that the amendment apply retroactively, under La. C.C. art. 6 the amendment applies prospectively only. Accordingly, we hold the 1990 amendment does not apply to Rey's and Segura's claims.

(2) The 1992 Amendment

Before reaching the issue of whether the 1990 amendment applies to plaintiffs' claims, we must address a threshold issue raised by the third circuit in its opinion in *Segura*. The third circuit noted that at the time of the proceedings in the trial court, Act 237 of 1992 had not yet been passed and "could not have been considered by the trial judge, much less applied to these proceedings." The court

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[27] *See* 1990 La. Acts No. 105, *supra*.

concluded that "in the normal scheme of events" the applicability of the 1992 amendment should not be argued for the first time on appeal.[28] If the third circuit is correct, then we need not consider LIGA's argument that the 1992 amendment applies.

The general rule is that appellate courts will not consider issues raised for the first time on appeal. See, e.g., *Fried v. Bradley*, 219 La. 59, 87, 52 So.2d 247, 257 (1950), and cases cited therein. Another general rule, however, is that an appellate court is bound to adjudge a case before it in accordance with the law existing at the time of its decision. See *Dripps v. Dripps*, 366 So.2d 544 (La. 1978), and cases cited therein. Where the law has changed during the pendency of a suit and retroactive application of the new law is permissible, the new law applies on appeal even though it requires reversal of a trial court judgment which was correct under the law in effect at the time it was rendered. *See id.* at 547-48. Needless to say, where the law has changed after the trial court's decision, the applicability of the new law can be argued for the first time only on appeal.

Thus, contrary to the third circuit's reasoning in *Segura*, the fact that that LIGA argued the applicability of the 1992 amendment for the first time on appeal does not relieve us of our duty to consider the merits of the argument. We therefore proceed to determine whether the 1992 amendment applies to plaintiffs' claims.

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[28] Despite this reasoning, the court of appeal went on to find that "in any event . . . the claim in this matter is not a 'pending claim' within the purview of Section 3 of Act 237 of 1992."

The relevant provision of La. R.S. 22:1386 as amended by Act 130 of 1990 was reenacted without change in Section 2 of Act 237 of 1992.[29] Thus, if we find the 1992 amendment applies to Rey's and Segura's claims pursuant to the retroactivity provision in Section 3 of the 1992 Act, the result will be the same as if the 1990 Act had applied—i.e., America's and Allstate's UM coverages will prime LIGA's coverage. Like the 1990 amendment, the 1992 amendment would change settled law relative to the UM insurers' substantive rights and would significantly alter the respective rights and obligations of the UM insurers and LIGA. We therefore find the 1992 amendment substantive for the same reasons we found the 1990 amendment substantive.[30]

Section 3 of Act 237 of 1992 provides: "This Act shall apply to all covered claims, as defined in R.S. 22:1379, *pending on or arising on or after the effective date of this Act*" (emphasis added). Section 3 constitutes an expression of legislative intent regarding retroactive application of the statute as amended and reenacted by the 1992 Act. *See* La. C.C. arft. 6; *Cole*, 599 So.2d at 1063. Accordingly, even though the 1992 amendment, like the 1990 amendment, is substantive, unlike the 1990 amendment it will apply retroactively to Rey's and Segura's claims if two requisites are met in each case: first, each claim must have been "pending" on June 10, 1992, the effective date of Act 237 of 1992; second, retroactive application of the amendment must not violate the federal and state constitutional pro-

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29 *See supra* note 15 and accompanying text.

30 *See supra* text accompanying note 27.

hibitions against impairment of contractual obligations or disturbance of vested rights.[31]

(a) Pendency of Plaintiffs' Claims

In deciding whether the plaintiffs' claims were "pending" within the meaning of Section 3 of Act 237 of 1992, both courts of appeal focused on the dates of the adjudications in the trial courts in relation to the effective date of the 1992 Act. Thus, the third circuit in *Segura* concluded that on June 10, 1992, the effective date of the Act, plaintiff's claim was not a "pending claim" but an "adjudicated claim."[32] The court reasoned as follows:

> [W]e find that the liability of LIGA vis-a-vis American which was adjudicated by the trial court in the consolidated hearing of October 21, 1991, relieved American of responsibility for the first $10,000 of plaintiff's damages and to that extent constitutes and adjudicated claim. In sum, we conclude that, under the particular circumstances of this case, the claim in this matter is not a "pending claim" within the purview of Section 3 of Act 237 of 1992.

In contrast, the fifth circuit in *Rey* concluded Rey's claim was a "pending claim" on June 10, 1992 because even

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31 *See supra* note 17 and accompanying test.

32 As recalled, the court of appeal previously had remarked that the applicability of Act 237 of 1992 should not be argued for the first time on appeal, a suggestion we have already rejected. *See supra* note 28 and accompanying text.

though the trial court had granted a partial summary judgment in favor of Allstate on May 20, 1992, "the adjudication vis-a-vis Allstate was not final until October 5, 1992" when the trial court ruled in favor of Rey and against LIGA.

This court considered the nature of a "pending" lawsuit in *Hebert v. Doctors Memorial Hospital*, 486 So.2d 717 (La. 1986). In that case, the issue was whether a suit against a hospital was "pending" within the meaning of La. C.C. art. 3463 so as to continue interruption of prescription against a solidary obligor.[33] In support of an exception of prescription, the solidary obligor, a physician, argued the suit ceased to be "pending" on the date the plaintiff executed a release in his favor, thus allowing prescription to commence running from that date as opposed to the later date on which the trial court signed a judgment dismissing the hospital. Consulting Black's Law Dictionary (5th ed. 1979) at page 1021, the court found

> that "an action or suit is 'pending' from its inception until the rendition of final judgment." It defines "pendency" at page 1020, as the "state of an action, etc., after it has begun and before the final disposition of it." And final disposition con-

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[33] [33] La. C.C. art. 3463 provides:

> An interruption of prescription resulting from the filing of a suit in a competent court and in the proper venue or from service of process within the prescriptive period *continues as long as the suit is pending*. Interruption is considered never to have occurred if the plaintiff abandons, voluntarily dismisses, or fails to prosecute the suit at the trial.

(Emphasis added.)

> notes a state of affairs "such that nothing further remains to fix the rights and obligations of the parties." The commonly understood meaning of the word in a legal context is appropriate.

Hebert, 486 So.2d at 720. The court concluded "a suit is pending until a final judgment dismissing it has been filed." *Id.* at 721. "Surely," reasoned the court, "until that suit is dismissed, the existence, validity and/or binding nature of the release is subjected to judicial scrutiny." *Id.*

The issue "subject to judicial scrutiny" in the present cases concerns the allocation of liability for plaintiffs' "covered claims." If plaintiffs' claims were "pending" on the effective date of Act 237 of 1992, then La. R.S. 22:1386 as amended would allocate primary liability for those claims to the UM insurers, American and Allstate. If the claims were not "pending," the old law would apply making LIGA primarily liable. Thus, something further remains to fix the rights and obligations of the parties within the meaning of the term "pending" as defined in *Hebert*.

We also find it significant that on June 10, 1992, the effective date of Act 237 of 1992, neither the judgment rendered by the trial court in *Rey*, nor that rendered by the trial court in *Segura*, were res judicata. Under the law of res judicata applicable in *Rey*,[34] [a] final judgment is

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[34] The Louisiana Legislature effected a substantial change in the law of res judicata in Act 521 of 1990. *See* La. R.S. 13:4231, comment (a). Section 1 of the Act enacted the new res judicata statutes, La. R.S. 13:4231-4232, while Section 3 of the Act repealed the old law of res judicata embodied in La. C.C.P. art. 1842. Section 5 of Act 521 of 1990 provides:

definitive when it has acquired the authority of the thing adjudged." La. C.C.P. art. 1842 (West 1990). "Thing adjudged" is defined in La. C.C. art. 3506(31) as "that which has been decided by a final judgment, *from which there can be no appeal*, either because the appeal did not lie, or because the time fixed by law for appealing is elapsed, or because it has been confirmed on the appeal" (emphasis added). Obviously, the trial court's judgment in *Rey had not acquired the authority of a thing adjudged on June 10, 1992 because that judgment was then on appeal. Similarly, under the law of res judicata applicable in Segura*, "a valid and final judgment is conclusive between the same parties, *except on appeal or other direct review* . . . ." La. R.S. 13:4231 (emphasis added). Because the trial court's judgment in *Segura* was on appeal on June 10, 1992, it was not conclusive between the parties at that time.

In light of the foregoing, we conclude a claim is *pending* as long as it is *subject to judicial scrutiny*. Even though a lower court has adjudicated a claim and rendered

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(footnote 34 continued)

> This Act shall become effective January 1, 1991, and shall apply to all civil actions filed on or after January 1, 1991. The preclusive effect and authority of a judgment rendered in an action filed before the effective date of this Act shall be determined by the law in effect prior to January 1, 1991.

In the present cases, Rey filed suit on July 30, 1990, and Segura filed suite on March 4, 1991. Thus, La. C.C.P. art. 1842 applies to determine the preclusive effect and authority of the judgment rendered by the trial court in *Rey*, whereas La. R.S. 13:4231 applies to determine the preclusive effect and authority of the judgment rendered by the trial court in *Segura*.

judgment, the claim continues to be pending until appeal of that judgment has been exhausted. Until then, something further remains to fix the plaintiff's right to enforce the claim as well as the defendant's obligation to pay it. In other words, a claim "pending appeal," as that phrase is commonly understood in a legal context, is a *pending* claim.

This interpretation of the term "pending" in Section 3 of Act 237 of 1992 is consistent with the previously cited general rule that an appellate court is bound to adjudge a case before it in accordance with the law existing at the time of its decision. As we observed in *Dripps*, 366 So.2d at 548, some changes in the law "even apply to *pending* law suits." In that case, the court understood the term *pending* to mean "pending the appeal": "This Court has held that if judgment be correctly given under a law which is repealed *pending the appeal*, this Court is bound to reverse it." *Id.* at 547 (emphasis added) (citing *State v. Johnson*, 12 La. 547 (1838), and *Cooper v. Hodge*, 17 La. 476 (1841)). Considering this longstanding jurisprudential practice of applying certain changes in the law retroactively on appeal, we conclude the legislature, in enacting the retroactivity provision in Section 3, must have intended Act 237 of 1992 to apply to covered claims pending appeal as well as those pending adjudication in the trial court.

For these reasons, we hold both plaintiffs' "covered claims" were pending on June 10, 1992, the effective date of Act 237 of 1992, within the meaning of the retroactivity provision in Section 3. Act 237 of 1992 therefore applies to plaintiffs' claims unless retroactive application would violate the constitutional prohibitions against impairment

of contractual obligations or disturbance of vested rights.

(b) Constitutionality of Retroactive Application

The Louisiana Legislature's power to enact retroactive laws is limited by the due process and contract clauses of the United States and Louisiana Constitutions. U.S. Const. amend. XIV, § 1; U.S. Const. art. I, § 10[1]; La. Const. art. I, § 2; La. Const. art. I, § 23. *See St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So.2d 809, 816 n.11 (La. 1992); *Board of Comm'rs v. Dept. of Natural Resources*, 496 So.2d 281, 291 (La. 1986); *Cahn v. Cahn*, 468 So.2d 1176, 1181 (La. 1985); *Graham v. Sequoya Corp.*, 478 So.2d 1223, 1226 (La. 1985) *Terrebonne v. South Lafourche Tidal Control Levee Dist.*, 445 So.2d 1221, 1224 (La. 1984); *Block v. Reliance Ins. Co.*, 433 So.2d 1040, 1044 (La. 1983); *Lott v. Haley*, 370 So.2d 521, 523 (La. 1979); *Burmaster v. Gravity Drainage Dist. No. 2*, 366 So.2d 1381, 1387 (La. 1978). Previously we determined retroactive application of Act 130 of 1990, and hence of Act 237 of 1992,[35] would not disturb plaintiffs' vested rights in a cause of action against the party or parties legally liable for their injuries.[36] Therefore the only remaining issue of constitutional law is whether retroactive application of Act 237 of 1992 would unconstitutionally impair American's and Allstate's contractual obligations.

The Contract Clause, Article I, Section 10[1] of the United States Constitution, provides:

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[35] *See supra* text accompanying note 29.

[36] *See supra* text accompanying note 22.

> No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligations of Contracts . . . .

Article I, Section 23 of the Louisiana Constitution of 1974 provides:

> No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted.

This court has described these constitutional provisions as "virtually identical" and "substantially equivalent." *Board of Comm'rs,* 496 So.2d at 291.[37] Although the language of each clause is facially absolute, its prohibition must be accommodated to the inherent police power of the state to safeguard the vital interests of its people. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 103 S.Ct. 697, 704, 74 L.Ed.2d 569 (1983); *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 434, 54 S.Ct. 231, 239, 78 L.Ed. 413 (1934); *Board of Comm'rs,* 496 So.2d at 292.

In *Board of Commissioners, supra,* this court detailed "the appropriate Contract Clause standard" as enun-

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[37] In *Board of Comm'rs,* 496 So.2d at 291, we noted:

> Article I, Sec. 23 of the 1974 Louisiana Constitution was adopted without debate following a brief explanation indicating that its provisions were intended to incorporate the substance of the contract clauses of the United States Constitution and the 1921 Louisiana Constitution. XV Records September 13, 1973, at 3-4.

ciated by the Supreme Court in *Energy Reserves, supra.*[28] That standard requires a reviewing court to conduct the following four-step analysis: first, the court must determine whether the state law would, in fact, impair a contractual relationship; second, if an impairment is found, the court must determine whether the impairment is of constitutional dimension; third, if the state regulation constitutes a substantial impairment, the court must determine whether a significant and legitimate public purpose justifies the regulation; finally, if a significant and legitimate public purpose exists, the court must determine whether the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. *Energy Reserves,* 459 U.S. at 410-13, 103 S.Ct. at 704-05; *Board of Comm'rs,* 496 So.2d at 292-93.

Regarding the first inquiry, we have already determined application of Act 130 of 1990 in the present cases would retroactively increase American's and Allstate's contractual obligations under the UM policies issued to Segura and Rey.[39] This determination applies to Act 237 of 1992 as well. At the times American and Allstate issued the UM policies, La. R.S. 22:1386 and *Hickerson, supra,* limited the UM insurers' liability under those policies to claims in excess of a tortfeasor's liability insurance even

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[38] *See also Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978); *United States Trust Co. v. New Jersey,* 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977); *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934).

[39] *See supra* notes 20-21 and accompanying text.

in the event of the insolvency of the tortfeasor's insurer. If the 1992 amendment to La. R.S. 22:1386 is applied, under those same policies the UM insurers would be primarily liable for plaintiffs' claims against Dixie Lloyds. We now conclude this increase in American's and Allstate's obligations under the UM policies issued to Segura and Rey would, in fact, constitute an impairment of contractual relationships. Similarly, in *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978), the Supreme Court found an impairment of a contractual relationship where a Minnesota law retroactively increased an employer's obligations under a private pension plan. The Court rejected "[t]he narrow view that the Clause forbids only state laws that diminish the duties of a contractual obligor and not laws that increase them...." *Id.* at 244 n.16, 98 S.Ct. at 2722 n.16.

The next inquiry is "whether the impairment is of constitutional dimension." *Board of Comm'rs,* 496 So.2d at 292. This inquiry requires a reviewing court to determine the severity of the impairment. "The severity of the impairment measures the height of the hurdle the state legislation must clear." *Allied Structural Steel,* 438 U.S. at 254, 98 S.Ct. at 2727. Minimal alteration of contractual obligations may end the inquiry at its first stage, while severe impairment will push the inquiry to a careful examination of the nature and purpose of the state legislation. *Id.* Total destruction of contractual expectations is not necessary for a finding of substantial impairment. *Energy Reserves,* 459 U.S. at 411, 103 S.Ct. at 704: *United States Trust Co. v. New Jersey,* 431 U.S. 1, 26-27, 97 S.Ct. 1505, 1519-20, 52 L.Ed.2d (1977); *Board of Comm'rs,* 496 So.2d at 292. On the other hand, state regulation that restricts a party to

the gains it reasonably expected from the contract does not necessarily constitute a substantial impairment, *Energy Reserves,* 459 U.S. at 411, 103 S.Ct. at 704; *United States Trust,* 431 U.S. at 31, 97 S.Ct. at 1522 (*citing El Paso v. Simmons,* 379 U.S. 497, 515, 85 S.Ct. 577, 587, 13 L.Ed.2d 446 (1965)); *Board of Comm'rs,* 496 So.2d at 292.

In measuring the severity of an impairment of contractual obligations, a reviewing court first must consider

> the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Allied Structural Steel, 438 U.S. at 245, 98 S.Ct. at 2723. The court also must consider whether the industry the complaining party has entered has been regulated in the past. *Energy Reserves,* 459 U.S. at 411, 103 S.Ct. at 704; *Allied Structural Steel,* 438 U.S. at 242, 97 S.Ct. at 2721 (*citing Veix v. Sixth Ward Bldg. & Loan Ass'n,* 310 U.S. 32, 38, 60 S.Ct. 792, 794, 84 L.Ed. 1061 (1940) ("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic")); *Board of Comm'rs,* 496 So.2d at 292. *See also Hudson Water Co. v. McCarter,* 209 U.S. 349, 357, 28 S.Ct. 529, 531, 52 L.Ed. 828 (1908) (Holmes, J.) ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the

power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter"). Thus, where a complaining party enters a contractual relationship in a heavily regulated industry, expectations of further regulation of that industry may lessen the severity of a subsequent impairment of that party's contractual rights and obligations.

In the present cases, the severity of the impairments of American's and Allstate's contractual obligations under the UM policies can be measured first by determining the extent to which their contractual expectations would be frustrated by retroactive application of La. R.S. 22:1386 as amended by Act 237 of 1992. At the times American and Allstate issued the UM policies to Segura and Rey, this court's interpretation of La. R.S. 22:1386 in *Hickerson, supra*, was the settled law of Louisiana. It is a fundamental principle that laws existing at the time a contract is entered into are incorporated into and form a part of the contract as though expressly written therein." *Board of Comm'rs*, 496 So.2d at 294; *see Dantoni v. Board of Levee Comm'rs of the Orleans Levee Dist.*, 227 La. 575, 80 So.2d 81, 83 (1955); *Johnson v. Anderson-Dunham Concrete Co.*, 212 La. 276, 31 So.2d 797 (1947); *Forgay v. Ferguson*, 6 La. Ann. 770 (1851). Accordingly, consistent with La. R.S. 22:1386 as interpreted in *Hickerson*, neither American nor Allstate obligated itself to provide its insured with coverage against the risk of insolvency of a tortfeasor's liability insurer. Each reasonably expected LIGA to cover claims against insolvent insurers even where UM coverage is otherwise available to a claimant. Thus, retroactive application of La. R.S. 22:1386 as amended by Act 237 of

1992 would frustrate the UM insurers' contractual expectations by requiring them to assume liability for their insureds' claims against Dixie Lloyds. To that extent, the impairments of American's and Allstate's contractual obligations under the UM policies would be substantial.

On the other hand, American and Allstate issued the UM policies to Rey and Segura against a background of pervasive state regulation of UM insurance. In Louisiana, UM coverage embodies a strong public policy and is determined not only by contractual provisions, but also by applicable statutes. *Roger v. Estate of Moulton*, 513 So.2d 1126, 1130 (La. 1987); *A.I.U. Ins. Co. v. Roberts*, 404 So.2d 948, 949-51 (La. 1981); *Breaux v. Government Emp. Ins. Co.*, 396 So.2d 1335, 1338 (La. 1979); *Seaton v. Kelly*, 339 So.2d 731, 733-34 (La. 1976). *See also Fireside Mutual Life Ins. Co. v. Martin*, 223 La. 583, 593, 66 So.2d 511, 514 (1953) ("The nature of the insurance business is impressed with the public interest, and, therefore the Legislature in large measure fixes the public policy"). The UM statute, La. R.S. 22:1409(D),[40] is incorporated into every policy of

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[40] La. R.S. 22:1406(D) provides in pertinent part:

(1)(a)(i) No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle designed for use on public highways and required to be registered in this state or as provided in this Subsection unless coverage is provided therein or supplemental thereto, in not less than the limits of bodily injury liability provided by the policy, under provisions filed with and approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover nonpunitive damages from owners or operators of uninsured or underinsured motor vehicles because of bodily injury, sickness, or disease, including death resulting therefrom; however, the coverage required under this Subsection shall not be applicable where any insured named in the policy shall reject in writing, as provided herein, the coverage or selects lower limits.

insurance to which it is applicable, as if it were written in the policy itself. *Block v. Reliance*, 433 So.2d 1040, 1044 (La. 1983). Moreover, "[n]ot only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Board of Comm'rs*, 496 So.2d at 293. Consequently, every UM policy incorporates the state's reserved power to regulate UM insurance.

Confronted with the state's broad power to regulate UM insurance and its pervasive exercise of that power, American and Allstate had reason to anticipate their obligations under the UM policies issued to Segura and Rey might be altered by further legislation. These cases therefore are distinguishable from *Allied Structural Steel*, *supra*, where the state law "did not operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken, but invaded an area never before subject to regulation by the State" and imposed "a completely unexpected liability in potentially disabling amounts." *Id.* at 247-50, 98 S.Ct. at 2724-25. In that case, the Court found severe impairment of the company's contractual obligations.[41] In the present cases, while we find retroactive application of La. R.S. 22:1386 as amended by Act 237 of 1992 would substantially impair American's and Allstate's contractual obligations under the UM policies, we also find that because the

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[41] *Cf. Energy Reserves*, 459 U.S. at 416, 103 S.Ct. at 707 ("ERG knew its contractual rights were subject to alteration by state price regulation. Price regulation existed and was foreseeable as the type of law that would alter contract obligations. . . . In short, ERG's reasonable expectations have not been impaired by the Kansas Act").

state has traditionally regulated UM insurance as a matter of public policy, at the time of contracting the UM insurers should have expected further legislation on the same topic. These expectations significantly lessen the severity of the impairments of the UM insurers' contractual obligations.

On balance, we conclude the impairments in these cases constitute more than minimal alteration of the UM insurers' contractual obligations and therefore are of constitutional dimension. We further conclude, however, the impairments constitute considerably less than total destruction of the UM insurers' contractual expectations. Accordingly, as we inquire into the public purpose justifying retroactive application of Act 237 of 1992, we emphasize the legislative judgment is entitled to consideable deference.

The determination of whether a significant and legitimate public purpose justifies the regulation is the third inquiry under the appropriate Contract Clause standard. As we noted in *Board of Commissioners*, 496 So.2d at 295, the Supreme Court has recognized that a state may legitimately protect a virtually limitless range of interests that conflict with or affect economic rights. *See e.g., East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 66 S.Ct. 69, 90 L.Ed. 34 (1945); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877 (1921). The public purpose requirement is primarily designed to prevent a state from embarking on a policy motivated by a simple desire to escape its financial obligations or to injure others through the repudiation of debts or the destruction of contracts or the denial of means

to enforce them. *Blaisdell*, 290 U.S. at 398, 54 S.Ct. at 231; *United States Trust*, 431 U.S. at 52, 97 S.Ct. at 1533 (1977) (Brennen, J., dissenting); *Board of Comm'rs*, 496 So.2d at 295. Because there are few limits on the legitimacy of public purposes, inquiry into whether the state has adopted truly public ends typically is perfunctory. *Board of Comm'rs*, 496 So.2d at 295.

In the present cases, we must determine whether a significant and legitimate public purpose justifies retroactive application of Act 237 of 1992. The Act itself may reasonably be viewed as a measure designed to ensure the continued availability of the protection LIGA affords claimants and policyholders who otherwise would suffer financial losses because of the insolvency of an insurer. By requiring claimants and policyholders to exhaust any available UM coverage before proceeding against LIGA, the Act serves to minimize the unnecessary deplection of LIGA's funds while at the same time furthering the LIGA Law's stated purpose of avoiding "financial loss to claimants or policyholders because of the insolvency of an insurer." La. R.S. 22:1376. Similarly, the legislature's decision to give Act 237 of 1992 retroactive effect may reasonably be viewed as a measure designed to *immediately* minimize unnecessary depletion of LIGA's funds. Clearly, retroactive application of Act 237 of 1992 would constitute a legitimate exercise of the state's police power for the purpose of protecting the state's citizens from economic harm.[42] For this reason we conclude a significant

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[42] *See Fireside Mutual Life Ins. Co. v. Martin*, 223 La. 583, 590-92, 66 So.2d 511, 513-14 (1953) (finding an amendment to the Louisiana Insurance Code an exercise of the state's police power); *see also* La. Const. art. 6, § 9(B) ("[T]he police power of the state shall never be abridged").

and legitimate public purpose justifies retroactive application of Act 237 of 1992.

The fourth and final inquiry is whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. *Energy Reserves*, 459 U.S. at 412, 103 S.Ct. at 705; *United States Trust*, 431 U.S. at 22, 97 S.Ct. at 1517; *Board of Comm'rs*, 496 So.2d at 293. Unless the state itself is a contracting party, as is customary in reviewing economic and social regulation, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure. *Id.* However, even when the law addresses a ligitimate end, it may not be used to burden a politically defenseless or easy target group with the imposition of costs without fair attention to its interests. *Board of Comm'rs*, 496 So.2d at 293; *cf. United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4, 58 S.Ct. 778, 783 n.4, 82 L.Ed. 1234 (1938).

The contractual relationships inpaired in these cases are private ones between Allstate and American as UM insurers on the one hand, and Rey and Segura as insureds on the other. Accordingly, as we examine the necessity and reasonableness of applying Act 237 of 1992 retroactively, the legislature's judgment is entitled to proper deference. In this context, we find that in choosing retroactive application of Act 237 of 1992 as a means of immediately minimizing unnecessary depletion of LIGA's funds, the legislature simply shifted the risk of insurer insolvencies from LIGA onto UM insurers which, but for LIGA, would have borne the risk anyway. This is because absent LIGA's

coverage of Rey's and Segura's claims against Dixie Lloyds, Dixie Lloyds would be unable to make payment on the claims because of insolvency; hence, as provided in La. R.S. 22:1406(D)(2)(a)[43] each tortfeasor's motor vehicle would be deemed an uninsured motor vehicle" within the meaning of the American and Allstate UM policies.[44] By making Act 237 of 1992 retroactive to pending claims, the legislature merely excludes from LIGA's coverage those pending claims otherwise covered by UM insurance.

The only potential obstacle to our finding retroactive application of Act 237 of 1992 reasonable and appropriate involves the concern initially expressed in *Hickerson* that a tortfeasor who is also a policyholder of an insolvent insurer might be left unprotected from subrogation claims asserted by a claimant's UM insurer.[45] As we observed in *Hickerson*, 383 So.2d at 379, such a result would frustrate the LIGA Law's stated purpose of avoiding "financial loss to claimants *or policyholders* because of the insolvency of an insurer." La. R.S. 22:1376 (emphasis added). By

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43 La. R.S. 22:1406(D)(2)(a) provides:

> For the purpose of this coverage, the terms "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency.

44 The *Hickerson* court's decision to interpret the LIGA law "to deem LIGA the insurer with all the obligations of the insolvent insurer" had removed motor vehicles insured by insolvent insurers from the scope of UM coverage. *Hickerson*, 383 So.2d at 379. *See supra* text accompanying note 14.

45 *See supra* notes 11-12 and accompanying text.

ultimately shifting the risk of insurer insolvency to unprotected policy holders of those insurers, retroactive application of Act 237 of 1992 would be unreasonable and inappropriate to achieve the legitimate end of minimizing unnecessary depletion of LIGA's funds.

In the present cases, we note the legislature addressed this concern in Act 105 of 1990 by amending the definition of a "covered claim" in La. R.S. 22:1379(3) to immunize policyholders of insolvent insurers against subrogation claims asserted by claimants' UM insurers.[46] We also note Section 3 of Act 237 of 1992 provides: "This Act shall apply to all covered claims, *as defined in R.S. 22:1379*, pending on or arising on or after the effective date of this Act" (emphasis added). Thus, we find the legislature, by specifically citing in Act 237 of 1992 the definition of "covered claim" as amended two years earlier by Act 105 of 1990, expressed its intent to give amended definition of "covered claim" retroactive application to pending claims. Furthermore, as a measure designed to protect policyholders of insolvent insurers, Act 105 of 1990 is a necessary concomitant of retroactive application of La. R.S. 22:1386 as amended by Act 237 of 1992 and imposes no financial burdens on UM insurers other than those

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46 La. R.S. 22:1379(3) as amended by Act 105 of 1990 provides in pertinent part:

(b) "Covered claim" shall not include any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise. *In addition, the insured of an insolvent insurer shall likewise not be liable for any subrogation claim asserted by any reinsurer, insurer, insurance pool, or underwriting association to the extent of the applicable liability limits previously provided to such insured by the insolvent insurer.*

heretofore contemplated in this opinion. Therefore, finding no further question arises as to the constitutionality of applying Act 105 of 1990 retroactively, we hold it applies retroactively in these cases and removes the only remaining impediment to retroactive application of Act 237 of 1992.

In sum, although retroactive application of La. R.S. 22:1386 as amended by Act 237 of 1992 would impair American's and Allstate's contractual obligations under the UM policies by making them primarily liable for Segaura's and Rey's claims against Dixie Lloyds, the adjustment of the UM insurers' rights and responsibilities is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. Accordingly, under the appropriate Contract Clause standard, we conclude retroactive application of Act 237 of 1992 would violate neither the federal nor the state constitutional prohibitions against impairment of contractual obligations.

CONCLUSION

For the foregoing reasons, we hold La. R.S. 22:1386 as amended by Act 237 of 1992 applies to the plaintiff's claim in each of these consolidated cases. Although we disagree in part with the reasoning of the Louisiana Fifth Circuit Court of Appeal in *Rey v. Guidry et al.*, No. 93-C-1401, we affirm the judgement of that court. We reverse the judgment of the Louisiana Third Circuit Court of Appeal in *Segura v. Frank et al.*,No. 93-C-1271, and re-

mand that case to the court of appeal for further proceedings consistent with this opinion.

(Emphasis added.)

APPENDIX F

ARTICLE III, SECTION 2., CLAUSE 1 of the United States Constitution provides:

> "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases Affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a party; — to Controversies between two or more States; between a State and Citizen of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States; and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

APPENDIX G

ARTICLE I, SECTION 10., CLAUSE 1, of the United States Constitution provides:

> "No State shall, enter into any Treaty, Alliance, or Confederation; grant letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

APPENDIX H

AMENDMENT XIV, SECTION 1. of the United States Constitution provides:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX I

ACT 237 of Regular Session of Louisiana Legislature states:

LOUISIANA INSURANCE GUARANTY ASSOCIATION—REMOVAL OF DOLLAR-FOR DOLLAR OFFSET AGAINST CLAIMANTS OF INSOLVENT INSURERS; DUTY TO DEFEND INSURED OF AN INSOLVENT INSURER

ACT NO. 237

H. B. No. 1485

AN ACT to amend and reenact R.S. 22:1386(A) and (C) and R.S. 22:1386(A)(2) and to enact R.S. 22:1386(D). relative to the Louisiana Insurance Guaranty Association; to remove the dollar-for-dollar offset used by said association against claimants of insolvent insurers; to provide for the duty to defend the insured of an insolvent insurance company; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S 22:1382(A)(2) is hereby amended and reenacted to read as follows:

§ 1382. Powers and duties of the association

A. The association shall:

* * *

(2) Be deemed the insurer to the extent of its obligations on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent; however, when the liability of the association under this Part has been exhausted by payment, the obligation of the association to provide a defense to the insured of an insolvent insurer shall cease.

* * *

Section 2. R.S. 22:1386(A) and (C) are hereby amended and reenacted and R.S. 22:1386(D) is hereby enacted to read as follows:

§ 1386. Nonduplication of recovery

A. Any person having a claim against an insurer under any provision in an insurance policy, other than a policy of an insolvent insurer which is also a covered claim, shall be required first to exhaust his rights under such policy. Such other policies of insurance shall include but shall not be limited to liability coverage, uninsured or underinsured motorist liability coverage, or both, hospitalization, and other medical expense coverage. As to the association, any amount payable by such other insurance shall act as a credit against the damages of the claimant, and the association shall not be liable for such portion of the damages of the claimant.

* * *

C. Any recovery under this Part by any claimant not

a resident of the state of Louisiana at the time such claim arose, or that payable by the insurance guaranty association or its equivalent in the claimant's state of residence. As to the association, any amount payable by the other guaranty association or its equivalent shall act as a credit against the damages of the claimant, and the association shall not be liable for that portion of the damages of the claimant.

D. The association shall have no duty to provide a separate defense at its cost to an insured of an insolvent insurer as to any issue arising out of the coverage of this Section.

Section 3. This Act shall apply to all covered claims, as defined in R.S. 22:1389, pending on or arising on or after the effective date of this Act.

Section 4. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided in Article III, Section 18 of the Constitution of Louisiana. If vetoed by the governor and subsequently approved by the legislature, this Act shall become effective on the day following such approval.

Approved June 10, 1992.

Supreme Court, U.S.
FILED
MAY 11 1994
OFFICE OF THE CLERK

No. 93-1649

In The

Supreme Court of the United States

October Term, 1993

ALLSTATE INSURANCE COMPANY,

Petitioners,

versus

LOUISIANA INSURANCE GUARANTY ASSOCIATION,

Respondent,

and

MATTHEW REY,

Respondent.

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Petition For Writ Of Certiorari
To The Louisiana Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether retroactive application of Act 237 of the 1992 Louisiana Legislature amending Louisiana Revised Statute Annotated 22:1386 violates the United States Constitution Article 1 Section 10.

2) Whether retroactive application of Act 237 of the 1992 Louisiana Legislature amending Louisiana Revised Statute Annotated 22:1386 violates the 14th Amendment Due Process Clause of the United States Constitution.

LIST OF PARTIES

Respondent, Louisiana Insurance Guaranty Association, respectfully relies upon the list of parties provided by petitioner, Allstate Insurance Company, in its Petition for Writ of Certiorari to the Louisiana Supreme Court, except to add that it is appearing on behalf of the liquidated Dixie Lloyds Insurance Company and Dixie's insured, Wendy Guidry.

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La. Rev. Stat. 22:1379(3)(d) 9
La. Rev. Stat. 22:1380 2
La. Rev. Stat. 22:1381 2
La. Rev. Stat. 22:1382(A)(3)(a)(i) 2
La. Rev. Stat. 22:1382(A)(3)(a)(ii)(aa) 8
La. Rev. Stat. 22:1406(D)(2)(a) 5

No. 93-1649

In The

Supreme Court of the United States

October Term, 1993

ALLSTATE INSURANCE COMPANY,

Petitioners,

versus

LOUISIANA INSURANCE GUARANTY ASSOCIATION,

Respondent,

and

MATTHEW REY,

Respondent.

Petition For Writ Of Certiorari
To The Louisiana Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Respondent, Louisiana Insurance Guaranty Association, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Louisiana Supreme Court decision in this case, reported at 630 So.2d 714 (La. 1994).

STATEMENT OF THE CASE

Respondent, Louisiana Insurance Guaranty Association, respectfully relies on the history of the case as contained in petitioner's statement of the case.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

As is noted in Applicant's Petition for Writ of Certiorari, the Louisiana Insurance Guaranty Association (hereinafter referred to as "LIGA") is a statutorily created, private, non-profit, unincorporated legal entity. La. Rev. Stat. 22:1380. It is governed by a board of directors, (La. Rev. Stat. 22:1381), and is composed of member insurers, including applicant, Allstate Insurance Company. La. Rev. Stat. 22:1380. Insurers which transact business in Louisiana fund LIGA based upon a percentage of premiums written. La. Rev. Stat. 22:1382(A)(3)(a)(i). The purpose of the Louisiana Insurance Guaranty Association law is defined as follows:

> The purpose of this part is to provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policy holders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies and to allow the association to provide financial assistance to member insurers under rehabilitation or liquidation, and to provide an association to

> assess the costs of such operations among insurers.

La. Rev. Stat. 22:1376.

The Louisiana Supreme Court recently stated that LIGA is not a state agency for any purpose. *Louisiana Insurance Guaranty Association v. Gegenheimer*, No. 93-CA-3021 (La. April 21, 1994).

As can be seen, the purpose of LIGA is to protect claimants and policy holders and to avert possible insurer insolvencies. Its purpose is not to protect solvent insurance companies, such as applicant, but instead provides that such solvent insurers shall pay the costs of the association.

This outline of LIGA and its stated purpose is important because in evaluating claims under the contract clause, this Court has held that an impairment arising out of a state's own contracts would be more stringently examined than laws regulating contractual relationships between private parties. *United States Trust Company v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505 (1977). As has been seen, LIGA is a private non-profit unincorporated legal entity, and not an agency of the State of Louisiana. Therefore, there is a lesser standard of review in the present case.

The outline further shows that the purpose of LIGA, and more particularly, the statutes complained of herein, are directed toward claimants and not toward solvent insurers, such as the applicant. Any effect on applicant of the legislation complained of was a secondary consequence of that legislation, but was not its direct purpose.

In the *Gegenheimer* case, the Louisiana Supreme court held that legislation assisting LIGA, and, therefore, protecting claimants, is a legitimate state interest, and is constitutional even if it creates some financial burden on others. *Gegenheimer,* at 5.

The source of funding for claims paid by LIGA is from viable insurance companies. This fact is seen from the statutory scheme which established LIGA and is admitted by applicant in its Petition, where it suggests that a more moderate course of action would be to increase the assessment against member insurers, rather than requiring members to pay uninsured motorist claims in a primary position. What applicant has admitted here is that it, along with the other solvent insurers, is going to pay for claims which LIGA must pay. Whether this payment comes from one pocket of viable insurance companies, i.e., the uninsured motorist claims as established by the legislature, or another pocket, i.e, increased assessments to member insurers, as applicant would suggest, the ultimate cost is borne by viable insurance companies such as applicant. To suggest that requiring payment from one source, as opposed to a second source, creates an interference of contractual relationship of constitutional proportions is ludicrous, because solvent insurance companies will ultimately pay this cost, either directly or indirectly. It also fails to give deference to state laws directed to social and economic problems, *Allied Structural Steel Company v. Spannaus,* 438 U.S. 243, 98 S. Ct. 2716 (1978), especially in consideration of the fact that the contracts allegedly impaired are not the state's own contracts. *United States Trust Company v. New Jersey,* 431 U.S. at 2223.

In its Application for Writ of Certiorari, petitioner claims that applying Act 237 retroactively totally destroys LIGA's obligation to uninsured motorist carriers. As has been seen, LIGA's obligation is not to uninsured motorist carriers, but rather to the claimants. Requiring the claimants to first exhaust their remedies against their uninsured motorist carriers does not ultimately affect their claim, it merely establishes a new order in which they make their recovery. Petitioner implies that LIGA's obligations are completely done away with by establishing this new procedure. This is not true. If the uninsured motorist policy is not large enough to cover the total amount of the claim, then LIGA will have to make a payment from an excess position. It is only in relatively small claims, such as the present $2,300.00 Judgment, in which LIGA will ultimately not have to make a payment.

Petitioner argues that there has been a substantial impairment of its contractual rights, but at the same time acknowledges that this took place in an area of the law which is historically very heavily regulated by the state. This heavy regulation was well-known to applicant before it issued the policy involved in this claim. Indeed, uninsured motorist policies must contain in their definition of "uninsured motorist", a motorist whose insurance company becomes insolvent. La. Rev. Stat. 22:1406(D)(2)(a).[1] This is

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[1] La. Rev. Stat. 22:1406

(2)(a) For the purpose of this coverage, the terms "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle where the liability insurer thereof is unable to make payment with

required to be written into every policy issued in Louisiana. La. Rev. Stat. 22:623.[2] Given this background, the insurance industry has long known that the insolvency of an underlying insurer is a possibility when they undertake the risk of issuing uninsured motorist coverage. Under this context, to say that there has been a substantial impairment of contractual rights becomes rhetoric, not substantive argument.

There has always been a cost analogous to the one complained of and it has always been passed on to viable insurance companies. The definition of a covered claim of LIGA, found in La. Rev. Stat. 22:1379(3)(b), has always excluded subrogation or similar claims which solvent carriers may have had against other carriers which are liquidated. This demonstrates that insurance companies should be aware of indirect costs which are passed on to them to fund LIGA.

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respect to the legal liability of its insured within the limits specified therein because of insolvency.

[2] **§ 623. Standard provision**

A. Insurance contracts shall contain such standard provisions as are required by the applicable chapters of this Code pertaining to contracts of particular kinds of insurance. The commissioner of insurance may waive the required use of a particular standard provision other than the provision required in Part XV of this chapter in a particular insurance contract form if:

(1) He finds such provision unnecessary for the protection of the insured, and inconsistent with the purposes of the contract, and

(2) The contract is otherwise approved by him.

Additionally, Allstate acknowledges in its brief that the legislature could have chosen to increase Allstate's assessment. When the legislature chose to require exhaustion of uninsured motorist coverage by claimants before LIGA had to pay claims, it knew full well that it was passing on a cost to the uninsured motorist carriers. As previously argued, to say that under such circumstances there is some substantial impairment is unfounded. The ultimate substance of any alleged impairment, i.e. additional expense to Allstate, is minimalized because Allstate knows, and admits, that it was going to pay some additional expense, whether it was through increased assessments, or paying uninsured motorist claims. Once again, this is not a substantial impairment of a nature which reaches constitutional proportion.

It should also be noted that the plaintiff in this case, Matthew Rey, has not made an appearance or submitted a brief in any appellate procedure in this claim. He certainly cannot feel that his contractual relationship with Allstate has been impaired.

Allstate further seems to claim that there was not a significant public purpose behind the action of the legislature in adopting Act 237. This is clearly not the case. As seen on Appendix A, from 1975 until September 1, 1985, there were a total of sixteen (16) liquidations covered by LIGA. The pace of liquidations changed dramatically in the mid-1980's. From September 1, 1985 through September 3, 1989, there were a total of twenty-nine (29) liquidations. Subsequent to September 3, 1989, there have been a total of forty-one (41) liquidations covered by LIGA. When the legislature acted first in 1990 and then in 1992, it was aware of this crises brewing in the insurance

industry in Louisiana. It was also aware that this crisis would have a devastating effect on LIGA and its ability to protect claimants and insureds. The legislature's actions, as interpreted by the Louisiana Supreme Court, are a reasonable reaction to a critical situation.

In *Louisiana Insurance Guaranty Association v. Gegenheimer*, the Louisiana Supreme Court upheld against constitutional attack a statute by which the payment of court costs by LIGA was deferred until the end of a case. The court noted that forty (40%) percent of LIGA's files are in litigation. The court held that an action i.e., deferred court costs, which reduces the financial burden on LIGA is the subject of an appropriate state interest in protecting policy holders and claimants of insolvent insurers, and is not unconstitutional, even if it places a financial burden on other entities, such as Louisiana's Clerks of Court. *Gegenheimer*, at 5.

Allstate claims in its brief that it has not received any consideration in the recent amendments to the LIGA laws. However, La. Rev. Stat. 22:1382(A)(3)(ii)(aa) was amended to reduce the maximum assessment chargeable to the solvent carriers. This will take effect in the year 2003, after, one hopes, the crisis in the insurance industry is resolved and paid for.

There have been other measures passed recently by the legislature which were designed to save LIGA money, but which do not increase the cost to viable insurance companies. The first was discussed in the *Gegenheimer* case, *supra*, in which LIGA was exempted from pre-paying court costs. Another measure was the deletion from

covered claims of contractual attorney fees, statutory penalties and attorney fees, court costs and interest. La. Rev. Stat. 22:1379(3)(d). These measures indicate the legislature was seeking other sources, besides viable insurance companies, from which to fund savings to LIGA, due to the severe situation faced by LIGA.

It should also be noted that the ultimate substance of Act 237, i.e. requiring claimants to exhaust other sources of insurance before seeking recovery against the Guaranty Association, is the substantive law in most other jurisdictions. Most states have Guaranty Associations similar to LIGA. Most of these other jurisdictions likewise have provisions dealing with other sources of insurance, the overwhelming majority of which require that claimants exhaust their remedies against other sources of insurance, including uninsured motorist coverage, before seeking recovery against the Guaranty Association. *See Hetzel v. Clarkin*, 772 P.2d 800 (Kan. 1989). The *Hetzel* court reviewed cases on this point from a number of states and noted that Louisiana was the only reported jurisdiction which did not give the State Guaranty Association a credit for the plaintiff's own insurance. A similar comment was made by the Iowa Supreme Court in *Stecher v. Iowa Ins. Guar. Assn.*, 465 N.W. 2d 887 (Iowa 1991). *See also, King v. Jordan*, 601 P.2d 273 (Ark. 1979); *Colorado Ins. Guar. Ass'n v. Harris*, 827 P.2d 1139 (Colo. 1992); *Pinkham v. Morrill*, 622 A.2d 90 (Me. 1993); *Vokey v. Massachusetts Insurers, Etc.*, 409 N.E.2d 783 (Mass. 1980); *Wondra v. American Family Ins. Group*, 432 N.W.2d 455 (Minn. Ct. App. 1988); *Carrier v. Hicks*, 851 P.2d 581 (Or. 1993); and *VA. Property & Cas. Ins. v. Intern. Ins.*, 385 S.E.2d 614 (Va. 1989).

For the reasons previously outlined in this brief, it is clear that there is no constitutionally impermissible retroactive application by the state law. There is a lesser standard of judicial review in this case, because the contracts involved are not the state's own contracts. Furthermore, this area of the law is one which has historically been very heavily regulated and, in fact, there long existed state laws precisely on the point of uninsured motorists and liquidations. Because of this, petitioner should have anticipated that future amendments and regulations were probable, and, therefore, the alleged impact on it is minimal. The legislation in question addressed a dire condition in the insurance industry in Louisiana due to the number of liquidations. The measures taken were designed to protect a broad group of society which otherwise would have been adversely affected by the great number of insolvent insurance companies. The relief was particularly appropriate to meet the emergency that existed, and it was reasonable under the circumstances. Finally, the legislature gave some relief to Allstate to take place at a future date when it was anticipated that the crisis would be over. These are all of the factors discussed by the court in *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 54 S. Ct. 231 (1934). Since this legislation meets all of the criteria in the *Blaisdell* opinion, this Court should give deference to the Louisiana legislature and should not restrict the manner in which it saw fit to address the crisis which it faced.

Furthermore, the legislation attacked does not violate the due process clause because it involves a legitimate legislative purpose in addressing a crisis in the insurance industry and is clearly supported by rational means. The

alternative solution suggested by Allstate is, in fact, a distinction without a difference; in the end, Allstate, and other viable insurance companies, will pay the costs of the crisis, either directly or indirectly.

CONCLUSION

Retroactive application of Act 237 of the 1992 Legislative Session does not constitutionally impair any contractual rights or obligations of Allstate Insurance Company. The legislation involves a legitimate area of state concern, and addresses a crisis situation in a rational manner. For this reason, the decision of the Louisiana Supreme Court is not contrary to the constitution of the United States, and this Court should not grant a writ of certiorari to address that decision.

Respectfully submitted,

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APPENDIX "A"

LIST OF INSOLVENT INSURANCE COMPANIES COVERED BY LIGA

Sherman A. Bernard, et al. v. Medallion Insurance Company
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 185,350 – Div. "I"/September 12, 1975

Sherman A. Bernard, et al. v. Manchester Insurance and Indemnity Company, et al.
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 185,491 – Div. "F"/February 13, 1976

State of Maryland Ex Rel., et al. v. Maryland Indemnity Insurance Company
Circuit Court of Baltimore City, Maryland
No.: 116A, Folio: 133, File No.: A55552/December 9, 1977

People of the State of Illinois, et al. v. Yorktown Indemnity Company, et al.
Circuit Court of Cook County, Illinois County Dept., Chancery Div., Illinois
No.: 88 CH 9367/February 7, 1979

In the Matter of the Liquidation of Reserve Insurance Company
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 225,070 – Div. "5"/June 8, 1979

Robert L. Ratchford, Jr., et al. v. Proprietors' Insurance Company, et al.
Court of Common Pleas, Franklin County, Ohio
No.: 91CV-07-3941/July 30, 1981

People of the State of Illinois, et al. v. Security Casualty Company, et al.
No.: 81 CH 6589/December 4, 1981

State of Florida, et al. v. Gulf American Insurance Company, et al.
In the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida
No.: 83-2962/March 3, 1984

In the Matter of Excalibur Insurance Company, et al.
2nd JDC, County of Ramsey, Minnesota
No.: 46903/September 5, 1984

John Kezer, et al. v. Aspen Indemnity Corporation, et al.
District Court, City and County of Denver, Colorado
No.: 84CV8609/September 6, 1984

In the Matter the Liquidation of Horizon Insurance Company
Supreme Court for the State of New York for New York County
No.: 42103/84/November 27, 1984

State of Delaware, et al. v. Pacific American Insurance Company, et al.
Court of Chancery of the State of Delaware in and for New Castle County
No.: 7771/January 23, 1985

State of Alabama, et al. v. Early American Insurance Company
Circuit Court of Montgomery County, Alabama
No.: CV 85-64-PH/February 1, 1985

In the Matter of the Liquidation of Ideal Mutual Insurance Company
Supreme Court for the State of New York for New York County
No.: 40275/85/February 7, 1985

State of Maryland, et al. v. Eastern Indemnity Company of Maryland
Circuit Court for Montgomery County
No.: 3406/February 11, 1985

In the Matter of the Liquidation of Union Indemnity Insurance Company of New York
Supreme Court for the State of New York for New York County
No.: 41292/1985/July 16, 1985

The State of Texas v. Commercial Standard Insurance Company
In the District Court of Travis County, Texas
167th JDC – No.: 373,842/October 4, 1985

Mary C. Hall, et al. v. Transit Casualty Company
In the Circuit Court of Cole County, Missouri
No.: CV185-1206CC – Div. "II"/December 3, 1985

People of the State of Illinois, et al. v. Heritage Insurance Company of American, et al.
County Department, Chancery Division, Illinois
No.: 85 CH 9239/February 26, 1986

Sherman A. Bernard, et al. v. Lloyd's of Louisiana
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 298,521 "E"/March 6, 1986

In the Matter of the Liquidation of American Fidelity Fire Insurance Company, et al.
Supreme Court of the State of New York, County of Nassau
No.: 2960/1986/March 26, 1986

In the Matter of the Liquidation of Midland Insurance Company
Supreme Court of the State of New York, County of New York
No.: 41294/1986/April 3, 1986

George Fabe, et al. v. The American Druggists' Insurance Company, et al.
Court of Common Pleas, Franklin County, Ohio
No.: 86CV-03-1381/April 30, 1986

Harry E. Eakin, et al. v. Allied Fidelity Insurance Company
In the Marion Circuit Court, County of Marion, State of Indiana
No.: C86-0469/July 15, 1986

In the Matter of the Liquidation of Dominion Insurance Company of America
Supreme Court of the State of New York, County of New York
No.: 40924/1986/August 19, 1986

State of Texas v. National Allied Insurance Company of Texas, Houston, Texas
In the District Court of Travis County, Texas
299th JDC – No.: 404,100/October 21, 1986

Insurance Commissioner of the State of California v. Mission Insurance Company
Superior Court of the State of California for the County of Los Angeles
No.: C572724/February 24, 1987

Insurance Commissioner of the State of California v. Mission National Insurance Company
Superior Court of the State of California for the County of Los Angeles
No.: C576324/February 24, 1987

Insurance Commissioner of the State of California v. Enterprise Insurance Company
Superior Court of the State of California for the County of Los Angeles
No.: C576325/February 24, 1987

In the Matter of the Liquidation of Constellation Reinsurance Company
Supreme Court of the State of New York, County of New York
No.: 43178/1986/February 24, 1987

Kenneth D. Merin, et al. v. Integrity Insurance Company, et al.
Superior Court of New Jersey Chancery Division-Bergen County, New Jersey
No.: C7022-86/March 24, 1987

Sherman A. Bernard, et al. v. Great Global Assurance Company
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 315029 – Div. "B"/April 27, 1987

IN RE: the Receivership of Southland Insurance Company, a Florida Corporation
Circuit Court of the Second Judicial Circuit in and for Leon County, Florida
No.: 87-926/January 19, 1988

George Fabe, et al. v. Reliable Insurance Company, et al.
Court of Common Pleas Franklin County, Ohio
No.: 87CV-11-7072/January 29, 1988

Sherman A. Bernard, et al. v. American Guaranty and Accident Company, Ltd.
19th JDC, Parish of Baton Rouge, Louisiana
No.: 326,947 – Div. "M"/March 26, 1988

State of Iowa, et al. v. American Excel Insurance Company
In the Iowa District Court for Polk County, Iowa
No.: CE29-16846/Mary 31, 1988

State of Iowa, et al. v. Carriers Insurance Company
In the Iowa District Court for Polk County, Iowa
No.: CE24-13873/November 19, 1988

Sherman A. Bernard, et al. v. Sunbelt Southern Lloyds
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 314,326 – Div. "E"/December 2, 1988

In the Matter of South Central Insurance Company
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 334,052 – Div. "E"/January 5, 1989

Roger M. Singer, et al. v. American Mutual Liability Insurance Company, et al.
Commonwealth of Massachusetts – Supreme Judicial Court for Suffolk County
No.: 89-23/March 9, 1989

Douglas D. Green, et al. v. Anglo-American Insurance Company
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 337,939 – Div. "I"/March 20, 1989

Douglas D. Green, et al. v. Champion Insurance Company
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 344,656 C/W 345,329 – Div. "M"/June 5, 1989

Dick Marquardt, et al. v. Pacific Marine Insurance Company, et al.
Supreme Court of the State of Washington, County of King
No.: 87-2-10527-0/June 7, 1989

Douglas D. Green, et al. v. American Lloyds
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 335,148 – Div. "K"/June 21, 1989

Constance B. Foster, et al. v. Paxton National Insurance Company
Commonwealth Court of Pennsylvania
No.: 186 M.D. 1989/June 26, 1989

Douglas D. Green, et al. v. New England International Surety of American, Inc.
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 342,555 – Div. "G"/September 22, 1989

IN RE: U.S. Indemnity Assurance Group, Inc.
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 341,837 "A"/October 13, 1989

Frank J. Kelley, et al. v. Cadillac Insurance Company, et al.
State of Michigan – Circuit Court for the County of Ingham, Michigan
No.: 89-64126-CR/January 20, 1990

People of the State of Illinois, et al. v. Intercontinental Insurance Company, et al.
In the Circuit Court of Cook County – Illinois County Department, Chancery Division, Illinois
No.: 89 CH 11201/January 12, 1990

State of Wyoming, et al. v. Laramie Insurance Company
State of Wyoming, County of Albany – District Court, Second Judicial District
No.: 22800/February 14, 1990

George Fabe, et al. v. The Ohio General Insurance Company, et al.
Court of Common Pleas, Franklin County, Ohio
No.: 90CVH02-1068/March 28, 1990

Douglas D. Green, et al. v. Mid-American Casualty Company
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 358-350 – Div. "E"/November 7, 1990

The State of Texas v. Commodore Insurance Company
District Court of Travis County, Texas – 261st Judicial District
No.: 491,860/December 20, 1990

Douglas D. Green, et al. v. Dixie Lloyds
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 362,569 – Div. "E"/December 20, 1990

State of Rhode Island, Providence, SC. v. American Universal Insurance Company, et al.
Superior Court, Rhode Island
No.: 90-9782/January 7, 1991

People of the State of Illinois, et al. v. Industrial Fire & Casualty Insurance Company, et al.
Circuit Court of Cook County, Illinois – County Department, Chancery Division
No.: 91-02082/March 6, 1991

Insurance Commissioner of the State of California v. Western Employers Insurance Company, et al.
Superior Court of the State of California for the County of Orange
No.: 652863/April 19, 1991

Lewis E. Melahn, et al. v. Protective Casualty Insurance Company
Circuit Court of the City of St. Louis, State of Missouri
No.: 914-00119/May 24, 1991

Hunter O. Wagner, Jr., et al. v. Sovereign Fire and Casualty Insurance Company
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 369,624 – Div. "J"/May 29, 1991

Hunter O. Wagner, Jr., et al. v. Imperial Lloyds
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 371,811 – Div. "K"/August 8, 1991

State of Texas v. International Service Insurance Company
District Court of Travis County, Texas – 201st Judicial District
No.: 91-10584/August 20, 1991

IN RE: Rockwood Insurance Company
Commonwealth Court of Pennsylvania
No.: 249 M.D. 1990/August 26, 1991

John A. Dixon, Jr., et al. v. Fidelity Fire and Casualty Insurance Company
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 370,097 – Div. "I"/September 4, 1991

State of Tennessee, et al. v. Universal Security Insurance Company
Chancery Court of the State of Tennessee – 20th JDC, Davidson County
No.: 91-2235-III/October 28, 1991

Commissioner of Insurance, et al. v. Old Hickory Casualty Insurance Company
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 372,243 – Div. "F"/October 31, 1991

Commissioner of Insurance, at al. v. Presidential Fire and Casualty Company
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 375,138 – Div. "F"/November 13, 1991

State of Texas v. Comco Insurance Company
District Court of Travis County, Texas – 345th Judicial District
No.: 91-14077/January 13, 1992

State of Nebraska, et al. v. Great Plans Insurance Company, Inc.
District Court of Lancaster County, Nebraska
No.: 478, Page 19/March 4, 1992

IN RE: Southern American Insurance Company
Third Judicial District Court for Salt Lake County, State of Utah
No.: 920901617/March 26, 1992

Darrell Cobb, et al. v. Colonial Lloyds
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 375,951 – Div. "D"/March 27, 1992

George Dale, et al. v. Andrew Jackson Casualty Insurance Company
Chancery Court of the First Judicial District of Hinds County, Mississippi
No.: 147,825/April 6, 1992

Darrell L. Cobb, et al. v. Arist National Insurance Group, et al.
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 375,759/May 4, 1992

Darrell L. Cobb, et al. v. North American Indemnity Company
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 375,344 – Div "D"/May 26, 1992

Darrell L. Cobb, et al. v. Alliance Casualty & Reinsurance Company
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 375,561 – Div. "A"/June 19, 1992

James H. "Jim" Brown, et al. v. Randall J. Toca, d/b/a American Surety & Fidelity
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 380-933 – Div. "F"/July 8, 1992

State of Oklahoma, et al. v. MCA Insurance Company, et al.
District Court within and for Oklahoma County, State of Oklahoma
No.: CJ-92-8816(32)/October 23, 1992

State of Florida, et al. v. First Southern Insurance Company, et al.
Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida
No.: 92-4127
October 31, 1992

James H. "Jim" Brown, et al. v. Automotive Casualty Insurance Company, et al.
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 384,804 – Div. "K"
January 20, 1993

James H. "Jim" Brown, et al. v. Pelican State Mutual Company
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 383,099 – Div. "A"
February 26, 1993

James H. "Jim" Brown, et al. v. Gulf Coast Casualty Insurance Company, et al.
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 390,375 – Div. "F"
April 2, 1993

James H. "Jim" Brown, et al. v. Magnolia Fire & Casualty Insurance Company
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 383,100 – Div. "M"
May 14, 1993

James H. "Jim" Brown, et al. v. Liberty Lloyds
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 386,040 – Div. "F"
May 17, 1993

James H. "Jim" Brown, et al. v. ANA Insurance Group, et al.
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 388,758 – Div. "D"
May 17, 1993

James H. "Jim" Brown, et al. v. The Cascade Insurance Company, et al.
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 389,997 – Div. "C"
August 12, 1993

James H. "Jim" Brown, et al. v. Bonneville Insurance Company
19th JDC, Parish of East Baton Rouge, Louisiana
No.: 393,209 – Div. "M"
October 22, 1993

The State of Texas v. Employers Casualty Company
District Court of Travis County, Texas
353rd Judicial District
No.: 92-02133
February 11, 1994